In the

Supreme Court of the United States

OCTOBER TERM, 1919

NO. 504

ALASKA FISH SALTING & BY-PRODUCTS COMPANY,

Plaintiffs in Error,

vs.

WALSTEIN G. SMITH,

Defendant in Error.

ERRATA
IN
BRIEF OF PLAINTIFF IN ERROR

1. p. 9, 5th line from bottom, word "the" should be "due."
2. p. 12, 7th and 8th lines from bottom, word "permissable" should be "permissible."
3. p. 15, 1st line, word "legilation" should be "legislation."
4. p. 16, 8th line from bottom, word "that" should be "the."
5. p. 21, bottom line, word "concuring" should be "concurring."
6. p. 22, 20th line from top, word "Allgever" should be "Allgeyer."
7. p. 27, 4th line from bottom, word "Short" should be "Shore."
8. p. 28, 1st line, word "Short" should be "Shore."
9. p. 58, 12th line from top, words "one tenth" should be "one ninth."
10. p. 65, 7th and 8th lines, the words "the promight have power to do in its suppression" should be stricken.
11. p. 83, 21st line from top, the words "28.18%" should be "28.12%."
12. p. 85, 4th line from top, the word "bsis" should be "basis."

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SUBJECT INDEX.

	Page
Statement of the Case,	1
Specification of Errors,	9
Brief of the Argument,	13
Argument,	17
The allegations of the complaint are to be taken as true as the case was decided on demurrer,	
The Federal Constitution is in force in Alaska	18
It is the duty of the judiciary to consider the real nature of legislation purporting to deprive citizens of constitutional rights,	19
The Federal Constitution guarantees citizens the right to pursue a lawful occupation,	21

Page

The plaintiff is a citizen within the protective guarantees of the Constitution, ... 27
The Alaska legislature derives its authority from Congress by the Act of August 24, 1912 (38 Stat., 616), ... 29
Alaska Session Laws, 1913, Chapter 52, ... 22
Alaska Session Laws, 1915, Chapter 76, ... 25
Alaska Session Laws, 1917, Chapter 74, ... 29
Comparative statement of taxes levied under territorial legislation in 1913, 1915 and 1917, ... 49-55
The tax on plaintiff's business and property is grossly and patently unfair as compared to the tax on any other business, ... 22, 59
The taxes on plaintiff's business constitute a plain abuse of taxing power, ... 59
The taxes are unreasonably discriminatory, confiscatory and prohibitory, and unconstitutional, ... 66
Plaintiff's business is a useful, legitimate and commendable business, ... 91
These taxes cannot be sustained upon a basis and for a reason which does not exist, ... 92
The Alaska legislature lacks authority to prohibit plaintiff's business and its classification for that purpose is void, 97
The Territory must exercise its police power subject to the Federal Constitution, ... 110
A charge made by the Territory for police supervision must bear a reasonable relation to the expense of the supervision afforded, ... 117
These taxes violate the Alaska Organic Act in the same respects that they violate the Federal Constitution, ... 119
The Territorial legislation in effect repeals the Congressional Acts of June 6, 1900, and June 26, 1906, ... 120
These taxes are not uniform upon the same class of subjects, 122
The taxes are property taxes, ... 122
The taxes violate the limitations of the Alaska Organic Act to which they are subject, ... 126
Conclusion, ... 142

Page

Adams v. Turner, 244 U. S. 590, 61 L. ed. 1336, ... 23, 81, 116
Alaska Pacific Fisheries v. Alaska, 236 Fed. 52, 59, 87, 94, 103, 128
Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, ... 23, 82, 110
American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, ... 17
American Sugar Refining Co. v. Louisiana, 179 U. S. 89,..74, 81, 96
Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771,.. 112
Atchison &c. R. Co. v. Matthews, 174 U. S. 76, ... 21, 78
Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, ... 90, 96
Atchison &c R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436.. 142
Atlantic Monthly, July, 1920, ... 85
Atlantic &c. Tel. Co. v. Philadelphia, 190 U. S. 160, ... 118
Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, ... 21, 24, 96
Bonger's Appeal, in re, 109 Pa. St. 79, ... 137
Bonk v. Apthorp, 12 Mass. 252, ... 129
Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, ... 23, 81, 112
Bell's Gap R. Co. v. Pennsylvania, 123 U. S. 232, 32 L. ed. 892, ... 23, 79
Binns v. United States, 194 U. S. 486, ..19, 86, 88, 89, 93, 124, 138
Booth v. Illinois, 184 U. S. 425, 46 L. ed. 622, ... 23, 82, 96
Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, ... 125
Brushaber v. Union Pac. R. Co., 240 U. S. 1, 60 L. ed. 493,..28, 66
Butcher' Union &c. Co. v. Crescent City &c. Co., 111 U. S. 746, 28 L. ed. 585, 691, ... 22, 114
Cargill (W. W.) Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, ... 23
Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, ... 153
Choctaw & c R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 235, 21
Cochran v. Schell, 107 U. S. 625, 27 L. ed. 544, ... 142
Colorado Springs v. Simas, (Colo.) 157 Pac. 194, ... 83
Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, ... 23, 59, 76, 77, 96
Constitutional Law, 12 Am. L. & P., 198, ... 109
Cooley on Taxation (2d ed.), 597, 598, ... 99
Cooley's Const. Lim. (5th ed.) 484, 486, ... 73
Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1918C, 960, ... 112
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. ed. 92, ... 23, 71, 72, 77, 78, 96
Dakota v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355, ... 62
Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169...17, 21, 23,81
Drexel, ex parte, 147 Cal. 763, 82 Pac. 427, 2 L. R. A. (N. S.) 588, ... 22
Ellis v. Frazier, 28 Ore. 462, 42 Pac. 642, 52 L. R. A. 654, .. 93
Erskine v. VanOrsdale, 82 U. S. 75, 15 Wall. 63, ... 142
Foot & Co. v. Stanley, 232 U. S. 505, 58 L. ed. 698, ... 118
Fretwell v. Troy, 19 Kan. 275, ... 26
Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, ... 24

Galveston &c. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031,.. 21
Gaur, Scott & Co. v. Shannon. 223 U. S. 468, 56 L. ed. 510,.... 142
Gibbons v. Ogden, 9 Wheat, 23, 6 L. ed. 1, 210, ... 81
Gulf &c. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666,..23, 28, 78, 96
Gulf & Ship Island R. Co. v. Hewes, 183 U. S. 66, ...124, 126
Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 L. ed. 477, ... 142
Hager v. Walker, (Ky.) 103 S. W. 254, 15 L. R. A. (N. S.) 195, ... 82
Halter v. Nebraska, 203 U. S. 34, 51 L. ed. 696, ...23, 112
Haynes v. Missouri, 120 U. S. 68, ... 81
Henderson v. Insurance Co., 135 Ind. 23, 38 N. E. 565, ... 132
Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, ... 23
House v. Mayes, 219 U. S. 270, 55 L. ed. 213, ... 24
Hutchison, ex parte, 137 Fed. 949, ... 82
Kansas v. Wilson, 101 Kan. 789, 168 Pac. 679, L. R. A. 1918B, 376, ...27, 116
Kehrer v. Stewart, 197 U. S. 60, ... 125
Keowa Co. v. Dunn, 21 Colo. 185, 40 Pac. 357, ... 132
Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, ...107, 108
Lake Shore &c. R. Co. v. Smith, 173 U. S. 648, 43 L. ed. 858, 27
Laurens v. Anderson, 65 S. C. 62, 55 S. E. 136, ... 33
Lawton v. Steele, 152, U. S. 133, 38 L. ed. 385, ...21, 23, 25, 90, 105. 113
Leloup, v. Port of Mobile, 127 U. S. 640, ... 125
Levi v. Louisville, (Ky.) 28 L. R. A. 480, ... 130
License Tax Cases, 5 Wall. 462, 72 U. S. 462, 18 L. ed. 496, ...87, 89, 90
Livingstone v. City Council, 41 Ga. 21, ... 133
Louisville &c. Co. v. Greene, 244 U. S. 522, 61 L. ed. 1291, .. 120
Magoun v. Illinois &c Bank, 170 U. S. 283, ...81, 96
Martin v. Waddell, 16 Pet. 376, 10 L. ed. 997, ... 113,
McCray v. United States, 195 U. S. 27, 49 L. ed. 78,..60, 61, 64, 65
McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248, ... 113
M'Culloch v. Maryland, 4 Wheat, 314, 4 L. ed. 579, ... 59
McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, ...97, 111
Miners' Bank v. Iowa, 12 How. 1, 13 L. ed. 867, ... 90
Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26, ... 28
Minces v. Schoenig, 72 Minn. 517, 75 N. W. 711, ...132, 137
Missouri v. Lewis, 101 U. S. 22, ... 81
Missouri &c. Ry. v. Haber, 169 U. S. 613, ... 81
Moffitt v. City of Pueblo, (Colo.) 133 Pac. 754, ... 83
Morton v. Macon, 111 Ga. 162, 50 L. R. A. 485, ... 26
Mountain Timber Co. v. Washington, 243, U. S. 219, 61 L. ed. 685, ...24, 81
Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, ...20, 23, 81, 90, 96, 112
Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, ...24, 112
Murphy v. Ramsey, 114 U. S. 44, ...88, 89, 115
New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 24

Nicol v. Ames, 173 U. S. 509, ... 21
Northwestern Fertilizing Co v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036, ... 112
Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737, ... 121
Oregon v. Wright, (Ore.) 100 Pac. 296, 21 L. R. A. (N. S.) 349, ...75, 76, 82, 131
Osborn v. The Bank of the United States, 9 Wheat. 783, ... 143
Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, ... 24
Ottumwa v. Zekind, 95 Io. 622, 64 N. W. 646, 29 L. R. A. 735, 83
Patterson v. Bark Eudora, 190 U. S. 169, 47 L. ed. 1002, ... 24
People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L. R. A. (N. S.) 1074, ... 118
Pitney v. State, 240 U. S. 387, 60 L. ed. 703, ... 112
Pittsburg &c. R. Co. v. State, 49 Oh. St. 189, 30 N. E. 435, 16 L. R. A. 380, ...130, 137
Poindexter v Greenhow, 114 U. S. 270, ... 143
Porto Rico v. Rosaly & Castillo, 227 U. S. 270, 57 L. ed. 507, ... 142
Postal Tel.-Cable Co. v. Taylor, 192 U. S. 64, ...21, 95, 118
Powell v. Pennsylvania, 127 U. S. 657, 32 L. ed. 253, ...23, 112
Price v. Illinois, 193 Ill. 114, 55 L. R. A. 589, ... 82
Rasmussen v. United States, 197 U. S. 516, 49 L. ed. 862, ... 19
Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 769, ...81, 98, 109, 112
Refman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, ... 24
Reser v. Umatilla Co., 48 Ore. 326, 86 Pac. 595, ...124, 137
Richardson v. Fajardo Sugar Co., 241 U. S. 44, 60 L. ed. 879, ... 142
Richardson, ex parte, (Cal.) 148 Pac. 213, ... 83
Salisbury v. Equitable Purchasing Co., 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, ...25, 82, 83, 84
San Mateo County v. Southern Pac. R. Co., 13 Fed. 151, ... 28
Scriven v. Lebanon, 99 Kan. 602, 162 Pac. 307, L. R. A. 1917C, 462, ... 82
Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, ... 213
Siler v. Louisville &c. R. Co., 213 U. S. 522, 61 L. ed. 1291. 121
Simms v. Parish of La., 22 La. Ann. 444, ... 133
Simms v. Simms, 175 U. S. 162, ... 88
Sinot v. Davenport, 22 How. 227, ... 81
Southern R. Co. v. Greene, 216 U. S. 406, 54 L. ed. 536, ...28, 71, 82
Smith v. County Com., 117 Ala. 196, 23 So. 141, ... 133
Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, ... 24
Smythe v. Ames, 169 U. S. 466, ... 28
Snow v. United States, 18 Wall. 317, 85 U. S. 317, 21 L. ed. 784, ... 102
St. Louis v. Knapp &c. Co., 104, U. S. 658, 26 L. ed. 883,.... 17
St. Louis v. Spiegel, 90 Mo. 587, 2 S. W. 839, ... 132
State v. Haun, 61 Kan. 146, 59 Pac. 340, ... 73
State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970, ..132, 141

CITATIONS. Page

State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, 82
State v. Moore, (N. C.) 22 L. R. A. 472, ...119, 132
State v. Pennoyer, 65 N. H. 113, 18 Atl. 878, ... 132
State v. Whitcom, 122 Wis. 110, 99 N. W. 468, 40 L. R. A. (N. S.) 1208, ...82, 132
State v. Wilson, 101 Kan. 789, 168 Pac. 769, L. R. A. 1918B, 374, ...27, 116
State v. Wright, 53 Ore. 350, 100 Pac. 296. 21 L. R. A. (N. S.) 349, ...75, 76, 82, 131
Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, ...21, 70, 81, 95, 107, 108, 112
Traux v. Rich, 239 U. S. 33, 60 L. ed. 131, ... 198
Thompson v. McLeod, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, ... 126
Watson, in re, 17 S. D. 486, 97 N. W. 463, ... 129
W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 23
Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347, ...125, 127
Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652,.... 132
Winston v. Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 165, ... 82
Yick Wo. v. Hopkins, 118 U. S. 356, ...73, 79, 80, 81
Yot Sang, in re, 75 Fed. 983, ...73, 82
United States v. McMillan, 165 U. S. 504, ... 88

STATUTES, ACTS, &c. Page

24 Stat., 170, Act of June 30, 1886, ... 106
30 Stat., 1253, 1336, Act of March 3, 1899, ...31, 103
31 Stat., 321, Act of June 6, 1900, ...31, 46, 86, 87, 89, 93, 99, 103, 104, 114, 139, 142
33 Stat., 531, Act of April 28, 1904, ... 139
34 Stat., 478, Act of June 26, 1906, ...30, 46, 86, 87, 89, 93, 99, 103, 104, 113, 114
38 Stat., 616, Act of August 24, 1912, ... 18, 29, 62, 65, 87, 92, 93, 98, 100, 105, 114, 119, 120, 123, 128, 133, 139.
Alaska Session Laws, 1913, Chap. 17, ... 142
Alaska Session Laws, 1913, Chap. 52, ...32, 48
Alaska Session Laws, 1915, Chap. 76, ...35, 48, 94
Alaska Session Laws, 1917, Chap. 74, ...39, 48, 74, 84, 94
Alaska Session Laws, 1917, Senate Joint Memorial No. 5, ... 106
Revised Statutes, Section 1891, ... 18

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BRIEF OF PLAINTIFF-IN-ERROR

STATEMENT OF THE CASE

This action is brought here on Writ of Error from a judgment of the District Court for the District of Alaska, Division Number One, dismissing the action of the plaintiff-in-error, who is hereinafter referred to as the plaintiff, against the defendant-in-error, who is hereinafter referred to as the defendant, to recover moneys paid by way of taxes by the plaintiff to the defendant as treasurer

of the Territory of Alaska for the tax years 1917 and 1918 under Chapter 74, Alaska Session Laws, 1917, enacted by the Alaska Territorial Legislature.

First suit: There were originally two actions: one for the 1917 taxes brought in 1918, being No. 1793-A of the District Court for the District of Alaska, Division Number One, in which an amended complaint was filed under stipulation on March 22, 1919 (Record, p. 10), to recover the tax of $2.00 per barrel on 4,112 barrels of fish oil, amounting to $8,224.00, and the tax of $2.00 per ton on 1,037 tons of fish meal, amounting to $2,074.00, making an aggregate sum of $10,298.00 for which judgment was asked, together with interest thereon at 8 per cent. per annum from January 14, 1918. (Record, pp. 1 to 11, Certificate of Correction, pp. 1 and 2.)

Second suit: This suit for the 1918 taxes was filed on February 17, 1919, being No. 1816-A of said Court, to recover the tax of $2.00 per barrel on 2,720 barrels of fish oil, amounting to $5,440.00, and the tax of $2.00 per ton on 645 tons of fish meal, amounting to $1,290.00, making an aggregate sum of $6,730.00 for which judgment was asked, together with interest thereon at 8 per cent. per annum from January 15, 1919. (Record, pp. 12 to 20.)

The pleadings allege that plaintiff is engaged in the fishing business and industry, and particularly in the manufacture and production of fish oil,

fertilizer and fish meal and products from herring fish either in whole or in part, at and in the vicinity of Killisnoo, in the Territory of Alaska, and that it and its predecessors in interest have been continuously engaged in said business at said place since 1886; that in order to successfully carry on said business and industry plaintiff and its predecessors in interest, at all times since 1886, have maintained and constructed, and plaintiff does now maintain a large and valuable plant consisting of docks, warehouses, storehouses, factory and other appurtenances and buildings at said place; that said business and industry is a useful, legitimate and commendable business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States of America, in that, it produces, among other things, fish oil, fish meal, fertilizer, glycerine, salt fish and by-products; that said business is necessarily conducted on a close and narrow margin of profits; that it is impossible to carry on, conduct and maintain said business and industry if plaintiff be required to pay the taxes in question (Record, pp. 1, 2, 12 and 13); that it is necessary to use herring fish in said business (Record, pp. 4 and 15); that no other person can or could continue to remain in said business and industry and continue to carry on said manufacture of fish oil, fish meal and fertilizer from herring in whole or in part and pay, as required and com-

pelled by said legislation, said taxes, and, if plaintiff be required to pay them, then it will be obliged to suspend its operations and cease from said business (Record, pp. 7 and 17.); and that that is the object sought to be attained by said legislation under the guise of a revenue measure. (Record, pp. 5 and 16.)

The pleadings further allege that Chapter 52, Alaska Session Laws, 1913, and Chapter 76, Alaska Session Laws, 1915, which is amendatory of the 1913 act, and Chapter 74, Alaska Session Laws, 1917, which is amendatory of the 1915 act, and particularly Section 1, 10th subsection, of the 1917 act, were, illegally and unlawfully, enacted by the Alaska Territorial Legislature, ostensibly solely as a revenue measure, but, in fact, for the purpose of prohibiting and restraining, under a guise of a revenue measure, plaintiff from continuing in its said business and industry, and to abolish plaintiff's said business and to confiscate its property, and that said law and section will not produce any revenue for the reason that said tax is so exorbitant, unfair, unreasonable, extortionate, confiscatory and prohibitive that, if enforced, it will entirely prohibit plaintiff and all others from engaging in the manufacture of fish oil, fertilizer and fish meal from herring either in whole or in part (Record, p. 15; Certificate of Correction, p. 1.); that each of said Session Laws are unconstitutional and void because each of them attempts to and does amend,

alter, and modify the fishing laws of the United States and laws of the United States providing for taxes on business and trade in Alaska, passed by Congress, and in force prior to and at the time of the passage of the Alaska Organic Act (38 Stat., 616), and that Chapter 74, Alaska Session Laws, 1917, is contrary to the provisions of that Organic Act because it attempts to and does levy an annual tax, upon plaintiff's property, in the Territory of Alaska, for Territorial purposes, in excess of one per centum of any valuation that might or could be lawfully fixed upon plaintiff's said property, as a basis for such assessment thereof, without making any provision for such assessment; that said taxes are not uniform upon the same class of subjects and are not levied and collected under general laws, nor are they based upon an assessment according to the actual value of plaintiff's property on which they are fixed or levied; that plaintiff and others similarly situated are deprived of their property without due process of law and are denied the equal protection of the law guaranteed by the Constitution of the United States, and particularly the 5th and 14th Amendments thereof (Record, pp. 2, 3, 13 and 14); that said taxes are excessive, exorbitant, extortionate, oppressive, prohibitive, confiscatory, discriminatory and unreasonable, and amounted on fish oil, in 1917, to 9.31 per cent. on the gross receipts and 84 per cent. on the net profits, and, in 1918, to

5.60 per cent. on the gross receipts and 113.64 per cent. on the net profits, and on fish meal, in 1917, to 4.60 per cent. on the gross receipts and 8.18 per cent. on the net profits and, in 1918, to 2.92 per cent. on the gross receipts and 28.12 per cent. on the net profits and that the greatest tax exacted from any other industry was 1 per cent. on the net profits, but in that case an exemption of $5,000.00 was first allowed; and, as a matter of fact, although there are other persons and corporations in the said territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the Territory, and that the said business of said other persons and corporations is in all essentials the same as the business of plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons (Record, pp. 5, 6, 16 and 17); that none of said Territorial acts provide for any regulation of plaintiff's business and that said tax is greatly in excess of the reasonable and necessary costs of any license or regulation whatsoever that could be reasonably required to be exercised over said business; and that the cost of regulating and supervising, and of issuing licenses for said business is, would be and has been no greater than that of any of the other businesses or industries for

which licenses are provided in said act, but that plaintiff's industry is arbitrarily, capriciously and unjustly taxed many times more than, namely, a percentage many times larger than that levied on any other business in the Territory, and that the Territory had no authority to impose said tax as a police or other regulation; and that, as a matter of fact, no regulation or police supervision whatsoever over said business is required, needed, or furnished therefor or thereto by said Territory (Record, pp. 5, 15, and 16; Certificate of Correction. p. 2.).

The pleadings also alleged other facts as to duress and the onerousness of the fines, penalties, and liens imposed for delinquency in payment of the taxes, but inasmuch as this point was waived by the demurrant when the demurrers were argued, we do not set them forth. (Record, pp. 25 and 31.)

The defendant, who is the treasurer of and for the Territory of Alaska (Record, pp. 2 and 12), appeared by his attorney, The Attorney General for the Territory, and filed a demurrer to the complaint in each case—(plaintiff by stipulation amended its complaint in the first suit, and the defendant's demurrer by the same stipulation was considered as going to the amended complaint [Record, p. 10]—on the grounds that the complaint did not state facts sufficient to constitute a cause of action against the defendant and that there was a defect of parties defendant. (Record, pp. 11

and 21.)

The demurrers in the two actions came on for hearing together and the two cases were consolidated into and considered as one case (Record, pp. 23), and "at the argument on the demurrer the objection that there was a defect of parties was expressly waived, as was also any contention that the complaint was insufficient in its allegations of duress or in any particular other than in its allegations as to the unconstitutionality of the tax." (Record, pp. 25 and 31.)

The Trial Court took the matter under advisement and thereafter rendered its written opinion holding that the Territorial legislation and the taxes were constitutional and valid (Record, p. 24); thereafter plaintiff filed its motion for judgment against the defendant notwithstanding said opinion or ruling (Record, p. 40), which the Court overruled (Record, pp. 40 and 41), and the plaintiff refusing to plead further the Court thereupon entered judgment against the plaintiff and in favor of the defendant (Record, pp. 30 and 31), from which judgment the plaintiff has prosecuted this Writ to this Court. (Record, p. 43.)

Hence, the sole question to be considered, as stated by the learned Trial Court, is: "Does the complaint state facts sufficient to show that the tax is unconstitutional." (Opinion, Trial Court, Record, p. 25; judgment, Record, pp. 31 and 41.)

This question, however, has two phases: 1st,

whether the Territorial legislation and the taxes imposed thereby violate the provisions of the Federal Constitution; and, 2nd, whether they violate the provisions of the Alaska Organic Act (38 Stat., 616.) (Record, pp. 2, 3, 13 and 14.)

SPECIFICATION OF ERRORS.

While there are eight formal Assignments of Error, based on the Trial Court's sustaining the demurrers, dismissing the complaints, denying plaintiff's motion for judgment, and rendering judgment against instead of in favor of plaintiff (Record, pp. 32 and 33), inasmuch as each error resulted from the Trial Court's upholding the constitutionality and validity of the Territorial legislation and the taxes imposed thereby, each assignment is predicated upon the same contention, i. e.:

First: That the Territorial legislation and the taxes imposed thereby, particularly in their application to and direct effect on plaintiff, its business and property, contravene and violate the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereof, because plaintiff is denied the equal protection of the laws, and is deprived of its liberty and property without the process of law, and its property is, in effect, taken for public use, without compensation in that, viz.:

(a) The legislative classification of plaintiff's business or industry is so plainly arbitrary

and unreasonable as to constitute class legislation, and that, whereas an unreasonable, confiscatory and prohibitive tax is levied on plaintiff's property, no such tax is laid on other businesses or industries, not even on those which in all essentials are in no wise to be differentiated from plaintiff's business; and

(b) The legislation is manifestly not only a clear abuse of the Territory's legislative authority to a degree such as to plainly indicate more than merely the abuse of a delegated power, but also the exercise of a power not conferred to the extent of an actual usurpation of the reserved authority of Congress, and it accomplishes, by means of an intentionally arbitrary and confiscatory exaction, laid under the guise of a tax, the unauthorized destruction and confiscation of a lawful pursuit, which accomplishment is the real legislative object although disguised as a revenue producing measure; and

(c) The legislation is a clear, arbitrary discrimination against the manufacture of fish oil and fish meal, from herring in whole or in part, although there is no reasonable distinction between that business and other businesses in all essentials similar thereto carried on in the Territory upon which no tax whatsoever is laid, and regardless of the fact that said busines is not one that affects, inherently or otherwise, the public health, morals or welfare, but is a legitimate, useful and com-

mendable business, and one which the Territorial legislature has no authority to prohibit even though it conceived that to do so were for the public good; and

(d) The legislation, if deemed to be a police regulation, makes a charge for such regulation or supervision far beyond any reasonable charge that could possibly be made therefor, and many times in excess of any possible expense therefor, and is many times larger than the charge made on any other business, even of the same class, although the cost thereof to the Territory in one instance is no greater than in the other; but that said legislation provides no actual supervision over, nor does the Territory furnish any supervision of, the business of manufacturing fish oil and fish meal, from herring in whole or in part, and, furthermore, the police supervision and control of the fisheries of Alaska is reserved by Congress in itself and, hence, the Territory can neither directly nor through the guise of a revenue producing, but in fact a revenue non-producing, measure prohibit plaintiff's business; and

(e) The legislation is extortionate, unfair and prohibitive, and, in one instance, so confiscatory as to result in a tax of 113.64 per cent. on the net profits for the year, or 13.6 per cent. more than what the net profits amounted to, thereby in effect resulting in the taking of private property for public use, without compensation.

Second: That the legislation and the taxes imposed thereby violate the Alaska Organic Act (38 Stat., 616), in the same respects as they contravene the Federal Constitution, because legislation enacted under the Organic Act must not be inconsistent with the Constitution of the United States.

Third: That the Territorial legislation and the taxes imposed thereby, further contravene and violate the Alaska Organic Act, in that, viz.:

(a) The taxes imposed thereby are not uniform on the same class of subjects, that is to say, said taxes are neither uniform on all occupations or businesses, nor are they uniform on all businesses of the same class, because no tax whatsoever is laid on other businesses which are similar in all essentials to plaintiff's business and in no wise to be differentiated therefrom, and, furthermore, that no such arbitrary, confiscatory and prohibitive tax as is laid on plaintiff's business is laid on any other business whatsoever; and

(b) The taxes imposed on plaintiff's property exceed one per centum of the actual value thereof, although the maximum per cent permissable for Territorial purposes is one per centum; and

(c) The taxes imposed actually are levied and fall upon plaintiff's property, but they are not assessed on the actual value of that property, nor are they levied under an assessment based upon the actual value of the property, but they are purely arbitrary impositions without regard to the value

of the property on which they fall and in utter violation of the constitutional limitations of the Alaska Organic Act.

BRIEF OF THE ARGUMENT.

I. The allegations of the amended complaint in the 1917 tax case and of the complaint in the 1918 tax case must be taken as true, because the case was decided upon demurrer.

II. The Constitution of the United States is in force and effect in the Territory of Alaska, and local legislation in violation thereof is void.

III. It is the right, even the solemn duty, of the judiciary to consider the real nature and effect of legislation purporting to deprive citizens of rights secured by the fundamental law of the land.

IV. The Constitution of the United States guarantees citizens the right and privilege to pursue a lawful business, and the tax which may be imposed upon the right to engage in an ordinary, useful, harmless business is not free from judicial control.

V. Corporations are citizens within the protection of the Fourteenth Amendment according them the right and privilege to pursue lawful occupations, and are within the protection afforded by the Fifth Amendment that no person shall be deprived of life, liberty, or property, without due process of law.

VI. The source of the legislative authority

of the Alaska Territorial Legislature is to be found in the Congressional Act of August 24, 1912 (38 Stat., 616), and that Act delegates only a limited authority to the Territorial Legislature, reserving therefrom the authority to amend, modify, alter or repeal the fish laws of the United States applicable to Alaska, of which the Act of June 26, 1906 (34 Stat., 478), is one, and the laws of the United States providing for taxes on business and trade, being the Act of June 6, 1900 (31 Stat., 321).

VII. The Territorial legislation, Chapter 52, Alaska Session Laws, 1913, Chapter 76, Alaska Session Laws, 1915, Chapter 74, Alaska Session Laws, 1917, and particularly Section 1, 10th subsection of the latter, impose a grossly and patently inequal and unfair tax on plaintiff's fishing business of manufacturing fish oil and fish meal, from herring in whole or in part, as compared to the tax levied on any other line of business.

VIII. The Territorial legislation and the taxes imposed by it are in violation of the Federal Constitution, and the Legislature has plainly abused its taxing power by exercising it, not for revenue, but for the purpose of destroying rights and privileges secured to plaintiff by the fundamental law of the land, and, even though there may be a seeming exercise of the taxing power, as a matter of fact the taxes are so arbitrary as to be a confiscation of property and not a lawful exertion of taxation.

IX. The legilation and the taxes thereby imposed are in violation of the "equal protection of the law" and "due process of law" clauses of the Fourteenth Amendment and of the "taking of property without compensation" and "due process of law" clauses of the Fifth Amendment, and are so unreasonable, arbitrary, confiscatory, discriminatory and prohibitory that not only is plaintiff denied the equal protection of the laws and deprived of its property without due process of law, but its lawful business, specifically protected by Congress, is prohibited, and, whereas other business similar in all essentials and which cannot be differentiated from it are considered praiseworthy and required to pay no tax, plaintiff is not only subjected to a prohibitory and confiscatory tax but is subjected to stringent fines and penalties for nonpayment thereof.

X. A classification cannot be sustained which is based upon a police regulation where the object sought to be accomplished is ostensibly the raising of revenue and, where to sustain it, would be equivalent to declaring it legal upon a basis and for a reason that does not exist in fact.

XI. A classification, regardless of whether reasonable or logical, cannot be sustained where it is made for the purpose of prohibiting a business, for the prohibition of which there is an absolute want of authority; and such classification is void.

XII. The want of power of the Territorial

Legislature to prohibit plaintiff from conducting its lawful business does not interfere with the police power of the Territory because that power must be exercised subservient to the Constitution.

XIII. A charge imposed for police supervision must bear a relation to the expense of the supervision afforded; otherwise, it is not constitutional.

XIV. The Territorial legislation and the taxes imposed thereby being violative of the Federal Constitution, it follows that they are violative of the Alaska Organic Act (38 Stat., 616).

XV. The Territorial legislation and the taxes imposed thereby are also contrary to the Alaska Organic Act because their effect is to amend, modify, alter and repeal the Congressional Acts of June 6, 1900 (31 Stat., 321), and June 26, 1906 (34 Stat., 478), and Congress has specifically reserved that power from the Territory.

XVI. The Territorial legislation and the taxes imposed thereby are also contrary to the Alaska Organic Act because they are not uniform upon the same class of subjects; that assessments are not according to actual value, in fact no assessments were made based upon the actual value; and the taxes, although levied for Territorial purposes, are in excess of one per centum per annum of any possible valuation which could be lawfully assessd upon the aeutal value of the property on which they fall.

ARGUMENT.

I.

THE ALLEGATIONS OF THE COMPLAINT MUST BE TAKEN AS TRUE BECAUSE THE CASE WAS DECIDED UPON DEMURRER.

The decision of the lower court was decided upon the demurrer to the amended complaint in cause No. 1793-A relating to the 1917 taxes (Record, pp. 10, 11, and 22), and upon the demurrer to the complaint in cause No. 1816-A relating to the 1918 taxes (Record, pp. 21 and 22), and on the ground that these complaints did not state facts sufficient to show the unconstitutionality of the taxes. (Record, pp. 25, 30 and 31.) The allegations of those pleadings are therefore to be taken as true.

Mr. Justice Day, speaking for this Court, in Dobbins v. Los Angeles, said:

> "As this case was decided upon the demurrer to the complaint, the allegations thereof must be taken as true."
>
> *Dobbins v. Los Angeles*, 195 U. S. 223, 234, 49 L. ed. 169, 194;

See also:

> *American School v. McAnnualty*, 187 U. S. 94, 103, 47 L. ed. 90, 94, 23 Sup. Ct. Rep. 33;
>
> *St. Louis v. Knapp, S. & Co.*, 104 U. S. 658, 661, 26 L. ed. 883, 884.

II.

THE CONSTITUTION OF THE UNITED STATES IS IN FORCE AND EFFECT IN THE TERRITORY OF ALASKA, AND LOCAL LEGISLATION IN VIOLATION OF THE CONSTITUTION IS VOID.

Congress took particular pains to emphasize that Territorial legislation should be in accord with the Constitution, first, by providing in Section 3 of the Organic Act of August 24, 1912, 38 Stat., 616, that "the Constitution of the United States * * * shall have the same force and effect within the said Territory, as elsewhere in the United States," and, later, by inserting in Section 8 of the same act, that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Moreover, Section 1891 of the Revised Statutes provides that:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

This Court, in Rasmussen v. United States, had directly before it the question whether an act depriving persons accused of misdemeanor in

Alaska of a right to trial by a common-law jury, was repugnant to the Constitution, and held:

> "As it conclusively results from the foregoing considerations that the 6th Amendment to the Constitution was applicable to Alaska, and as, of course, being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the Act of Congress under consideration, depriving persons accused of a right to trial by a common-law jury, was repugnant to the Constitution and void."
>
> *Rasmussen v. United States*, 197 U. S. 516, 528, 49 L. ed. 862, 867.

See also:

Binns v. United States, 194 U. S. 491.

Hence, if Congressional legislation pertaining to Alaska is void because contrary to the Constitution, it must follow that legislation, enacted by a legislature dependent upon Congress for its legislative authority must also be void if violative of Constitutional guarantees.

III.

IT IS THE DUTY OF THE JUDICIARY TO CONSIDER THE REAL NATURE AND EFFECT OF LEGISLATION PURPORTING TO DEPRIVE CITIZENS OF RIGHTS SECURED BY THE FUNDAMENTAL LAW OF THE LAND.

The fact that the license taxes in question are imposed by a legislative act does not operate to

prevent this Court from considering them with a view of ascertaining whether or not that act denies plaintiff the equal protection of the laws or deprives it of some other constitutional guaranty. On the contrary, as this Court has said, it is not only the right, but the duty of the judiciary to consider the real nature and effect of things, regardless of the language or verbiage used by the legislature.

In speaking for this Court, in Mugler v. Kansas, 123 U. S. 623, 661, Mr. Justice Harlan said:

> "The Courts are not bound by mere forms, nor are they to be misled by mere pretence. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Again this Court said, speaking by Mr. Justice Holmes:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Galveston &c. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037;

This doctrine has also been announced by this Court in many other cases, viz.:

Austin v. Tennessee, 179 U. S. 343, 344, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

Choctaw &c. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 235, 237;

Atchison &c. R. Co. v. Matthews, 174 U. S. 105;

Nicol v. Ames, 173 U. S. 509, 515;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169;

Lawton v. Steele, 152 U. S. 133, 137;

Tanner v. Little, 240 U. S. 369, 60 L. ed. 691;

Postal Tel. Co. v. Taylor, 192 U. S. 64, 72, 73;

IV.

THE CONSTITUTION OF THE UNITED STATES GUARANTEES CITIZENS THE RIGHT AND PRIVILEGE TO PURSUE A LAWFUL BUSINESS, AND THE TAX WHICH MAY BE IMPOSED UPON THE RIGHT TO ENGAGE IN AN ORDINARY, USEFUL, HARMLESS BUSINESS IS NOT FREE FROM JUDICIAL CONTROL.

It is a fundamental principle of constitutional law that a citizen has the right and privilege to carry on a lawful business.

Mr. Justice Field, in his concuring opinion, in

Butchers Union, &c., Co. v. Crescent City &c., Co., clearly announced that principle.

> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."
>
> *Butchers' Union Slaughterhouse and Live Stock Landing Co. v. Crescent City Live Stock and Slaughterhouse Co.*, 11 U. S. 746, 757, 4 Sup. Ct. Rep. 652, 26 L. ed. 585, 591.

In the later case of Allgever v. Louisiania, 165 U. S. 578, 41 L. ed. 832, Mr. Justice Peckham said:

> "The liberty mentioned in that amendment (referring to the 14th Amendment of the Federal Constitution) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

See also:

Powell v. Pennsylvania, 127 U. S. 657, 658, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992;

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 1343;

Bell's Gap R. Co. v. Pennsylvania, 123 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 431;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431;

Cotting v. K. C. Stock Yards Co., 183 U. S. 79, 81, 46 L. ed. 92, 22 Sup. Ct. Rep. 30;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18;

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255;

Halter vs. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 625;

Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 18 Sup. Ct. Rep. 383;

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 14 Sup. Ct. Rep. 499;

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273;

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 925;

Booth v. Illinois, 184 U. S. 425, 428, 46 L. ed. 623, 22 Sup. Ct. Rep. 425;

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 468, 45 L. ed. 619, 626;

House v. Mayes, 219 U. S. 270, 281, 55 L. ed. 213, 217, 31 Sup. Ct. Rep. 234;

Otis v. Parker, 187 U. S. 606, 608, 47 L. ed. 323, 23 Sup. Ct. Rep. 821.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 676, 37 Sup. Ct. Rep. 247, L. R. A. 1917D 1;

Frisbie v. United States, 157 U. S. 160, 165, 166, 39 L. ed. 637, 659.

Murphy v. California, 225 U. S. 623, 628, 629, 56 L. ed. 1229, 1232, 32 Sup. Ct. Rep. 69, 41 L. R. A. (N. S.) 153;

Smith v. Texas, 233 U. S. 630, 636, 58 L. ed. 1129, 1132, 34 Sup. Ct. Rep. 651, L. R. A. 1915D 677;

Austin v. Tennessee, 179 U. S. 343, 361, 45 L. ed. 224, 233, 21 Sup. Ct. Rep. 132;

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 696;

Patterson v. Bark Eudora, 190 U. S. 169, 173, 47 L. ed. 1002;

Reiman v. Little Rock, 237 U. S. 171, 179, 59 L. ed. 900, 904, 35 Sup. Ct. Rep. 511;

And, as said by this Court, speaking through Mr. Justice Brown:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, 501.

State courts have held, and this is the rule in Kentucky, that there is a distinction between raising revenue by a license tax on occupations and an ad valorem tax, and, that while the latter is within the discretion of the legislature within constitutional or statutory limits, the former is not free from judicial control.

> "In that case" (referring to Hagar v. Walker, 128 Ky. 1, 107 S. W. 254, 15 L. R. A. (N. S.) 199, 203) "the rule to which we have just adverted is fully recognized, but it is further held that such freedom is not given in the exercise of the power to levy license taxes upon occupations, the court saying: 'But this unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations, or professions. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the Constitution, although its purpose may be the raising of revenue. Thierman Co. v. Com., 123 Ky. 740, 97 S. W. 366; Bagland v. Anderson, 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865.'"

Salisbury v. Equitable Purchasing Co., 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, 1116.

And in speaking for the Kansas Supreme Court, Mr. Justice Brewer, later of this Court, indicated, in Fretwell v. Troy, 18 Kan. 275, that in his opinion it was not true "that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus, in effect, destroy certain kinds of business."

The Alaska Territorial Legislature, acting as it does under delegated power, is, we submit, in possession of similar legislative powers to those delegated to a municipality under statute, and, unless it has express or implied authority therefor, cannot suppress a legitimate business any more than a municipality could do so without such authority.

Or, as said by the Supreme Court of Georgia:

> "The city of Macon may tax occupations, but there is nothing in its charter which either expressly or by implication authorizes it to directly suppress any legitimate business, or to indirectly accomplish such a result under the guise of an ordinance purporting to impose a license tax for the purpose of raising revenue, but having for its real object the prohibition of that very business."
>
> *Morton v. Macon*, 111 Ga. 162, 50 L. R. A. 485, 487.

And in State v. Wilson, the Supreme Court of Kansas said:

> "An ordinance enacted merely under statutory authority to impose license taxes, supplemented by a general grant of power to legislate for the welfare of the city, will be held

unreasonable and void if it is manifestly in excess of the needs of the municipality, and out of proportion to other taxes. Scriven v. Lebanon, 99 Kan. 602, L. R. A. 1917 C. 460, 162 Pac. 307. But a city ordinance, except where it conforms strictly to an express and specific legislative grant, is far more amenable to judicial supervision than a statute. 6 R. C. L. 244; 28 Cyc. 370; 2 Cooley, Taxn. 3d ed. 1140. The amount of tax which may be imposed upon the right to engage in an ordinary, useful, harmless business is limited, and the power of the legislature itself in that regard is sometimes said to be confined within very narrow bounds. 25 Cyc. 611."

State v. Wilson, 101 Kan. 789, 168 Pac. 679, L. R. A. 1918B, 374, 376.

V.

CORPORATIONS ARE CITIZENS WITHIN THE PROTECTION OF THE FOURTEENTH AMENDMENT ACCORDING THEM THE RIGHT AND PRIVILEGE TO PURSUE LAWFUL OCCUPATIONS.

The fact that plaintiff is a corporation does not affect its right and privilege to engage in a lawful business, because it is a person within the constitutional guaranty of that right and privilege.

This Court in Lake Short and Michigan R. Co. v. Smith, said:

"A corporation is a person within the protection of the Fourteenth Amendment."

Lake Short &c. R. Co. v. Smith, 173 U. S. 648, 690, 19 Sup. Ct. Rep. 565, 43 L. ed. 858;

The following decisions are also to the same effect:

Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26;

Smythe v. Ames, 169 U. S. 466, 522, 526;

Gulf &c. Ry v. Ellis, 165 U. S. 154;

So. R. Co. v. Greene, 216 U. S. 406, 412, 54 L. ed. 536, 540.

And the clause in the Fifth Amendment of the Federal Constitution, declaring that no person shall be deprived of life, liberty, or property, without due process of law, also protects the plaintiff even though a corporation. Mr. Justice Field, when on circuit in California, said:

> "This amendment contains a prohibition upon the government of the United States, similar to the one in the Fourteenth Amendment against the action of the states, declaring that no person shall be deprived of life, liberty, or property, without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals."

San Mateo County v. So. Pac. R. Co., 13 Fed. 151.

See also:

Brushaber v. Un. Pac. R'd. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504.

VI.

THE ACT OF AUGUST 24, 1912 (38 Stat., 616), IS THE SOURCE OF THE LEGISLATIVE AUTHORITY OF THE ALASKA LEGISLATURE, TO WHOM A LIMITED AUTHORITY IS DELEGATED BY THAT ACT.

On August 24, 1912, Congress enacted the act entitled "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," (38 Stat. L. 616), which is now commonly known as the Organic Act of Alaska.

Section 3 of that act reads:

> "That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature; Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States, or to the game, fish and fur-seal laws and laws relating to fur-

bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States."

Two very apparent and express restrictions or limitations are laid on the local legislature's power in legislating relative to the business in which plaintiff is engaged, i. e.: terming it either the fishery business, or, the manufacture of fish products, i. e., fish oil and fertilizer (fish meal). (Record, pp. 1 and 12).

One is, "that the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the * * * fish * * * laws * * * of the United States applicable to Alaska."

Inasmuch as the Act of June 26, 1906, 34 Stat. L. 478, Sec. 259, Compiled Laws of Alaska, 1913, under which plaintiff conduct its business, is the

law by which Congress governs the fish and fisheries of Alaska, in fact, the act itself is entitled "An Act for the protection and regulation of the fisheries of Alaska," it will scarcely be denied that when Congress used the term "fish laws of the United States applicable to Alaska," it referred to this act which reads in part:

> "That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the Territory known as Alaska, * * * * *, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said busines and output as follows: Canned salmon, four cents, per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton * * * * *."

And as a further restriction or limitation on the powers of the Territorial Legislature, Congress further enacted that the authority of the local Legislature to alter, amend, modify, and repeal laws in force in Alaska should not extend "to the laws of the United States providing for taxes on business and trade," undoubtedly meaning thereby to refer to the Act of March 3, 1899, 30 Stat. L. 1253, 1336, as amended by the act of June 6, 1900, 31 Stat. L. 321, 330, Sec. 2569, Compiled Laws Alaska, 1913, which likewise recognizes plaintiff's business and recognizes it as the fishery business in the following words;

"That any person or persons, corporations or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, towit: * * * Fisheries: * * * fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton, * * *."

VII.

THERE IS A GROSS AND PATENT INEQUALITY IN THE AMOUNT OF THE TAX LEVIED ON THE PARTICULAR LINE OF BUSINESS CARRIED ON BY PLAINTIFF AS COMPARED WITH THE TAX LEVIED ON OTHER LINES OF BUSINESS.

The Territorial Legislature, which was organized under the authority of said Act of August 24, 1912 (38 Stat., 616), enacted, at its biennial sessions in 1913, 1915 and 1917, the three session laws complained of and which, so far as material parts applicable to this case are concerned, are as follows:

Chapter 52, Alaska Session Laws, 1913 (H. B. No. 96), which is entitled "An Act to establish a system of taxation, Create Revenue, and Provide for Collection thereof for the Territory of Alaska, and for other purposes," reads as follows:

"Section 1. That any person or persons, cor-"poration, or company prosecuting or attempting to

"prosecute any of the following lines of business "within the Territory of Alaska, shall first apply "for and obtain license so to do from the District "Court or subdivision thereof in said Territory, and "pay for said license for the respective lines of busi- "ness and trades, as follows, to wit:"

(Note: the schedule of taxes provided is shown in the comparative statement herein at pages 48-55, which summarized statement shows the amount of taxes on the respective occupations, businesses, &c.)

"Sec. 2. That the licenses provided for in this "act shall be issued by the clerk of the District "Court or any subdivision thereof in compliance "with the order of the court or judge thereof duly "made and entered; and the clerk of the court shall "keep a full record of all applications for "license and of all recommendations for and "remonstrances against the granting of li- "censes and the action of the court thereon: "Provided, that the clerk of said court in "each division thereof shall give bond or bonds in "such amount as the Treasurer of the Territory "may require and in such form as the Governor "may approve, the premium on said bond to be "paid from any funds in the Treasury of the Ter- "ritory of Alaska not otherwise appropriated, and "all moneys received for licenses by any clerk of a "District Court in this Territory under this act, "except the moneys derived from fisheries, (one- "half of which amount shall be paid by the clerk "into the Territorial Treasury to be made available "for the propagation and preservation of salmon "and other fish in the Territory of Alaska and to be "expended under the direction of the United States "Bureau of Fisheries) shall, except as otherwise "provided by law, be covered into the Treasury of "the Territory of Alaska, under such rules and

"regulations as the Territorial Treasurer may pre-
"scribe.

"Sec. 3. That any person, corporation or com-
"pany doing or attempting to do business in viola-
"tion of the provisions of this act, or without first
"having paid the license therein required, shall be
"deemed guilty of a misdemeanor, and upon con-
"viction thereof shall be fined, for the first offense,
"in a sum equal to the license required for the
"business, trade or occupation; and for the second
"offense, fine equal to double amount of the license
"required; and for the third offense, three times the
"license required and imprisonment for not less than
"thirty days nor more than six months; Provided,
"That each day business is done or attempted to be
"done in violation of this act shall constitute a sep-
"arate and distinct offense; Provided further, That
"in all prosecutions under this act the costs shall be
"assessed against any person, firm or corporation
"convicted of violations hereof, in addition to the
"fine or penalty imposed, and for failure to pay
"such fine and costs such person, firm or corpora-
"tion may be imprisoned, in the discretion of the
"court, at the rate of one day for every two dollars
"of said fine and costs; Provided further, however,
"that in the event of any person, firm, or corpora-
"tion shall fail to pay the license required by the
"provisions of this act and shall further fail to
"pay any fine that may be imposed by a court of
"competent jurisdiction, for such failure to so pay
"said license fee or tax required by the provisions
"of this act, judgment may be entered against such
"firm, person, or corporation and process shall be
"issued for the enforcement of the collection of said
"judgment and in the same manner as judgments
"in civil proceedings.

"Sec. 4. All United States marshals and their
"deputies as ex-officio constables, United States fish
"commissioners and their deputies, in the Territory

"of Alaska are hereby made license inspectors under "this act and shall have power and authority to go "upon premises and examine the books, papers, bills "of lading, and all other documents bearing upon "any matters provided for in this act, of any per- "son, firm, or corporation whom they have reason- "able grounds to believe is evading this act; and if "any United States marshal, or his deputy, United "States fish commissioner or his deputy, as ex-officio "constables shall find any person, firm or corpora- "tion violating this act, or any provision thereof, it "shall be the duty of said deputy marshal to go be- "fore a United States commissioner, file a com- "plaint in writing charging the person, firm or cor- "poration so violating this act with a misdemeanor, "as provided herein, and upon obtaining a warrant "upon said complaint to arrest the said person, firm, "or corporation and take him or them before the "United States commissioner issuing the warrant, "for trial.

"Approved, May 1, 1913."

Chapter 76, Alaska Session Laws, 1915 (H. B. 109.), which is entitled "An Act to establish a sys- "tem of taxation, create revenue, and provide for "collection thereof, for the Territory of Alaska, and "for other purposes; and to amend an Act entitled "'An Act to establish a system of taxation, create "revenue, and provide for collection thereof for the "Territory of Alaska, and for other purposes,' ap- "proved May 1, 1913, and declaring an emer- "gency," reads as follows:

"Section 1. That any person, firm or corpora- "tion prosecuting or attempting to prosecute any of "the following lines of business in the Territory of "Alaska shall apply for and obtain a license and "pay for said license for the respective lines of busi- "ness as follows:"

(Note: the schedule of taxes provided is shown in the comparative statement herein at pages 48-55, which summarized statement shows the amount of taxes on the respective occupations, businesses, &c.)

"Section 2. Every person, firm or corporation "desiring to engage in any of the lines of business "specified in Section One, shall first apply to and "obtain from the Territorial Treasurer a license. "If the tax for the license applied for is a fixed sum, "the amount of such license tax shall accompany the "application. If the amount of the tax is not a "fixed sum, the applicant shall state in his applica- "tion that he agrees to pay the license tax, and will "make a true return and will pay to the Treasurer "such tax on or before the 15th day of the next en- "suing January. The Applicant shall also state the "name of the person, firm or corporation making "the application, the line of business to be licensed, "and the place where said business will be carried "on. Upon the receipt of the application in proper "form, the Treasurer shall issue the license as of "the date of the application, and the applicant may "carry on the business from and after the date the "application is actually made. All license taxes, "except those where the tax is a fixed one, shall be "due and payable on December 31st of each year, "and must be paid on or before January 15th fol- "lowing. And it shall be the duty of the person, "firm or corporation engaged in any of said lines "of business, to make a return under oath, to the "Treasurer on or before January 15th of each year, "setting forth the name of the license, the number "of the license, and all the facts regarding the busi- "ness, necessary to enable the Treasurer to deter- "mine the amount of the tax to be paid. And all ap- "plications for renewals of such licenses shall be "made on or before January 15th of the calendar "year for which such renewal is made.

"Provided: Any person, firm or corporation "now engaged in any of the lines of business speci- "fied in Section one shall comply with this Act on "or before July 1st, 1915, by applying for the li- "cense (and paying the tax if a fixed sum) for the "calendar year ending December 31st, 1915, and "all taxes for the current year shall be calculated "for the year beginning January 1st, and ending "December 31st, 1915.

"Any person, firm or corporation violating any "of the provisions of this Act shall be deemed guilty "of a misdemeanor and upon conviction thereof "shall be punished by a fine of the amount of the tax "with ten per cent. added, for which the defendant "was liable. Each month or fraction of a month in "which business is carried on in violation of this "Act shall be deemed a separate offense, and prose- "cution therefor may be by information filed by the "Attorney-General or other authorized legal counsel "of the Territory in any Court of competent juris- "diction, and upon conviction the Court shall enter "a judgment for the fine and costs incurred and "such judgment may be enforced as judgments in "civil actions or by imprisonment at the rate of one "day for each two dollars of such fine and costs. "PROVIDED: That in any prosecution hereunder "the Attorney-General or other authorized legal "counsel of the Territory, may, with the consent of "the Governor, compromise the case by accepting "from the defendant a sum not less than the tax, "legal interest thereon and all costs and expenses.

"The Territorial Treasurer is authorized and "directed to prescribe suitable forms for applica- "tions, licenses, returns and such other forms as "may be necessary or proper to carry this law into "effect. He shall distribute such forms to the public "through the Clerks' of the Court and Marshal's "offices in the several divisions for use of those "subject to the taxes herein laid.

"Section 3. It shall be the duty of the Attor-"ney-General or other authorized legal counsel of "the Territory to enforce the provisions of this Act; "and for that purpose, may with the approval of "the Governor, employ such assistants as he may "deem necessary, but the compensation for the serv-"ices of such assistants shall be paid out of the fund "recovered, and the Territory shall not be liable "therefor in any event beyond fifteen (15) per cent. "of the amount so recovered in each case; assistant "counsel may, however, be employed at a previously "agreed upon and stipulated fixed fee.

"Section 4. Special remedies provided by this "Act, or other Acts of the Legislature shall not be "deemed exclusive, and any appropriate remedy "either civil or criminal or both, may be invoked by "the Territory in the collection of all taxes, and in "civil actions the same penalties may be collected, "as are herein provided in criminal actions.

"Section 5. All taxes levied, laid or provided "for in this Act and penalties and interest accrued, "are hereby declared to be a lien upon the real and "personal property of the person, firm or corpora-"tions liable therefor, paramount and superior to "all mortgages, hypothecations, conveyances and as-"signments.

"Section 6. It shall be the duty of the United "States Marshals and Deputy Marshals in the Ter-"ritory of Alaska to enforce the provisions of this "Act in their respective precincts, districts or divi-"sions and to report all violations thereof to the "Governor, and under his direction file information, "or take such proceedings as he may direct; and for "the services so performed they shall be paid under "the provisions of Section three hereof. And for all "negligence or wilful failure to perform such duties, "Marshals and Deputy Marshals shall be liable to "the Territory for all losses sustained, which liabili-"ties may be enforced in any appropriate proceed-

"ing. And in the enforcement of this Act the At-
"torney-General or other legal counsel for the Ter-
"ritory and the Marshals and Deputy Marshals
"have the right to inspect the premises and all
"books and papers of the persons, firms or corpora-
"tions claimed to be liable to the taxes herein laid,
"which right of inspection shall be enforced by the
"Courts upon application therefor.

"Section 7. The Act of which this Act is an
"amendment is hereby repealed, except in so far as
"the same is hereby re-enacted, but nothing herein
"contained shall be construed to relieve any person,
"firm or corporation from the payment of any tax,
"penalty and interest accrued and owing under the
"Act of which this Act is an amendment, but all
"such taxes, penalties and interest shall be paid, or
"collected and enforced in the same manner as taxes
"herein provided for are collected and enforced.

"Section 8. An emergency is hereby declared
"to exist and this Act shall be in full force and ef-
"fect from and after its passage and approval.

"Approved, April 29, 1915."

Chapter 74, Alaska Session Laws, 1917 (H. B. 87), which is entitled "An Act to amend Sections 1 "and 2 of Chapter 76, Laws of Alaska, 1915, en-"titled, 'An Act to establish a system of taxation, "create revenue and provide for collection thereof "for the Territory of Alaska, and for other pur-"posses; and to amend an Act entitled 'An Act to "establish a system of taxation, create revenue and "provide for collection thereof for the Territory of "Alaska, and for other purposes,' approved May 1st, "1913, and declaring an emergency,' approved "April 29, 1915," which reads as follows:

"Section 1. That Sections 1 and 2 of Chapter "76 Laws of Alaska, 1915, approved April 29, 1915, "be and the same are hereby amended to read as "follows:

"Section 1. That any person, firm or corpora-
"tion prosecuting or attempting to prosecute any
"of the following lines of business in the Territory
"of Alaska shall apply for and obtain a license and
"pay for said license for the respective lines of busi-
"ness as follows:

"1st: Attorneys-at-law, doctors, including
"persons practicing medicine, surgery, or osteo-
"pathy, and dentists; Ten Dollars per annum.

"Each member of a firm shall be liable for this
"tax.

"2nd: Automobiles operating for hire; Five
"Dollars per annum.

"3rd. Bakeries doing a business in excess of
"five hundred dollars per annum; fifteen dollars per
"annum.

"4th. Electric Light and Power Plants selling
"light, power and steam for heat and supplies to the
"public; one half of one per cent of the gross re-
"ceipts in excess of Twenty-five hundred dollars
"from light, power and steam sold.

"One half of one per cent of the net profits
"from supplies sold.

"Employment agencies operating for hire and
"collecting a fee from employees; Five Hundred
"Dollars per annum.

"6th: Fisheries: Salmon canneries, four and
"a half cents per case on Kings and Reds or Sock-
"eye; Two and a half cents per case on Medium
"Reds; two cents per case on all others.

"7th: Salteries: Two and one-half cents per
"one hundred pounds on all fish salted or mild cured,
"except herring.

"8th: Fish Traps: Fixed or floating, one
"hundred dollars per annum, so called dummy traps
"included.

"9th: Cold Storage Plants: Doing a busi-
"ness of one hundred thousand dollars per annum
"or more, five hundred dollars per annum; doing a

"business of seventy-five thousand dollars per an-
"num and less than one hundred thousand dollars,
"three hundred and seventy-five dollars per annum;
"doing a business of fifty thousand and less than
"seventy-five thousand dollars per annum, two hun-
"dred and fifty dollars per annum; doing a busi-
"ness of twenty-five thousand and less than fifty
"thousand dollars, per annum, one hundred and
"twenty-five dollars per annum; doing a business
"of ten thousand dollars and less than twenty-five
"thousand dollars per annum, fifty dollars per an-
"num; doing a business of four thousand, and less
"than ten thousand dollars per annum; twenty-five
"dollars per annum; doing a business of under four
"thousand dollars per annum, ten dollars per an-
"num . The 'annual business' under this section
"shall be considered the gross amount received for
"the product and for storage of produce for others.

"10th: Fish-Oil-Works: Using Herring in
"whole or in part in the manufacture of fish-oil;
"two dollars per barrel.

"Fertilizer and Fish Meal Plants: Manufactur-
"ing fertilizer and Fish Meal in whole or in part
"from herring; two dollars per ton.

"11th: Laundries: Doing a business of over
"Two Thousand and less than Five Thousand dol-
"lars per annum, twenty-five dollars per annum;
"doing a busines of five thousand or more and less
"than ten thousand dollars per annum, fifty dollars
"per annum; doing a business of ten thousand dol-
"lars or more per anum, seventy-five dollars per
"annum.

"12th: Meat Markets: Doing a business of
"not less than ten thousand nor more than twenty-
"five thousand dollars per annum, twenty-five dol-
"lars per annum; doing a business of not less than
"twenty-five thousand nor more than fifty thou-
"sand dollars per annum, fifty dollars per annum;
"doing a business of not less than fifty thousand nor

"more than seventy-five thousand dollars per an-
"num, one hundred dollars per annum; doing a busi-
"ness of not less than seventy-five thousand dollars
"nor more than two hundred thousand dollars per
"annum, two hundred and fifty dollars per annum;
"doing a business of over two hundred thousand dol-
"lars per annum, five hundred dollars per annum.
"That every separate meat market or establishment
"shall be considered a separate business.

"13th: Mining: One per cent. of the net in-
"come in excess of Five thousand dollars. By 'net'
"income is meant the cash value of the output of
"the mine less operating expenses, repairs and bet-
"terments, actually made and royalties actually
"paid, and all taxes paid under Section 2569 of the
"Compiled Laws of Alaska.

"Provided, that the lessor of any mine operated
"under a lease shall be deemed to be engaged in
"mining within the provisions of this act and the
"royalties, less the cost of collecting the same, re-
"ceived by him, shall be deemed to be the net income
"within the provisions of this Act.

"Provided, further that where a mine is op-
"erated under a lease with option to purchase and
"the terms of the contract provide that royalties
"paid thereunder shall be credited as part of the
"purchase price, such royalties shall not be deducted
"from the gross output in computing the net in-
"come.

"No deduction shall be made on account of de-
"preciation or machinery, interest on bonds or
"money borrowed or other taxes paid. By 'Mining'
"is meant any operation by which valuable metals,
"ores, minerals or marketable stone is extracted
"from the earth.

"14th: Ships and Shipping: Freight and
"Transportation: Ocean and coast-wise vessels do-
"ing business for hire plying in Alaska waters,
"registered in Alaska and not registered elsewhere

"in the United States and not paying a tax or li-
"cense elsewhere, and freight and passenger lines
"propelled by mechanical power registered in the
"Territory of Alaska and not paying a license or
"tax elsewhere in the United States, and river and
"lake steamers and barges as well as transportation
"lines doing business wholly within the Territory of
"Alaska, one dollar per ton on net tonnage, custom
"house measurement of such vessel.

"15th: Telephone Companies: One-half of one
"per cent. of gross receipts in excess of Fifteen
"hundred dollars ($1500.00).

"16th: Water works: Selling water or power
"to the public one half of one per cent. of gross
"receipts in excess of twenty-five Hundred Dollars
"($2500.00).

"17th: Public Messengers: Twenty-Five Dol-
"lars ($25.00) per annum.

"Section 2. Every person, firm or corpora-
"tion desiring to engage in any of the lines of busi-
"ness specified in Section 1 shall first apply for and
"obtain from the Territorial Treasurer a license.
"If the tax for the license applied for is a fixed one,
"the amount of such license tax shall accompany the
"application. If the amount of the tax is not a
"fixed sum, the applicant shall state in his appli-
"cation that he agrees to pay the license tax and
"will make a true return and will pay to the
"Treasurer such tax on or before the fifteenth of
"the next ensuing January.

"The applicant shall also state the name of the
"person, firm or corporation making the applica-
"tion; the line of business to be licensed and the
"place where said business will be carried on. Upon
"the receipt of the application in proper form, the
"Treasurer shall issue the license as of the date of
"the application, and the applicant may carry on
"the business from and after the date the applica-
"tion was actually made.

"All license taxes, except those where the tax is "a fixed one shall be due and payable on December "thirty-first of each year and must be paid on or "before January fifteenth following.

"Provided, that the Treasurer shall have the "power to extend such time until the fifteenth of "the next ensuing March upon the special showing "made by the licensee that such extension is neces- "sary in order to enable him to ascertain the "amount of the taxes due, and it shall be the duty "of the person, firm or corporation engaged in any "of said lines of business to make a return under "oath to the Treasurer on or before January fif- "teenth of each year, or in case of an extension as "above provided, on or before March fifteenth, set- "ting forth the name of the licensee, the number of "the license and all the facts regarding the busi- "ness necessary to enable the Treasurer to determine "the amount of the tax to be paid and all applica- "tions for renewals of such licenses shall be made "on or before January fifteenth of the calendar year "for which such renewal is made.

"Provided, that any person, firm or corpora- "tion engaged in or about to engage in mining, may "designate in his application for a license the last "day of any month in the year as the day of the "closing of his fiscal year, and shall be entitled to "have the tax payable by such person, firm or cor- "poration computed upon the basis of the net in- "come, ascertained as herein provided for the full "year ending on the day so designated in the year "preceding the date when the tax is due, instead of "upon the basis of the net income of the calendar "year preceding the date when the tax is due.

"Any person, firm or corporation violating any "of the provisions of this Act shall be deemed "guilty of a misdemeanor and upon conviction "thereof shall be punished by a fine of the amount "of the tax with ten per cent. added for which the

"defendant was liable. Each month or fraction of "a month in which business is carried on in viola- "tion of this Act shall be deemed a separate of- "fense and prosecution therefor may be by informa- "tion filed by the Attorney-General or other author- "ized legal counsel of the Territory in any Court of "competent jurisdiction, and upon conviction the "Court shall enter a judgment for the fine and costs "incurred, and such judgment may be enforced as "judgments in civil action or by imprisonment at "the rate of one day for each two dollars of such "fine and costs. PROVIDED: That in any prose- "cution hereunder, the Attorney-General or other "authorized legal counsel of the Territory may, "with the consent of the Governor, compromise the "case by accepting from the defendant a sum not "less than the tax, legal interest thereon and all "costs and expenses.

"The Territorial Treasurer is authorized and "directed to prescribe suitable forms for applica- "tions, licenses, returns and such other forms as "may be necessary or proper to carry this law into "effect. He shall distribute such forms to the pub- "lic through the Clerks' of the Court and Marshal's "office in the several divisions for use of those sub- "ject to the taxes herein laid.

"Section 3. The Sections of the Act which "this Act amends are hereby repealed, except in so "far as the same are hereby re-enacted, but nothing "herein contained shall be construed to relieve any "person, firm or corporation from the payment of "any tax, penalty and interest accrued and owing "under the sections of this Act which this act "amends, but all such taxes, penalties and interest "shall be paid, collected or enforced in the same "manner as taxes herein provided for are collected "and enforced.

"Except as otherwise provided in this Act, all "licenses shall be issued for the calendar year be-

"ginning on January first and ending on December "thirty-first of each year, and where the tax is not "a fixed sum but is computed after the close of "the year's business, it shall be computed on the "basis of the business done during such calendar "year, and all taxes for the current year shall be "calculated upon the basis of the schedule adopted "by this Act.

"Approved May 3, 1917."

A comparison between the Federal license taxes and the Territorial license taxes indicates very strongly the Territorial Legislature's real purpose when it laid its tax on plaintiff's business. Under the act of June 6, 1900, 31 Stat. L. 331, Sec. 2569, Compiled Laws of Alaska, 1913, supra, Congress laid a license tax on plaintiff's business of 10 cents per barrel on fish oil, and 20 cents per ton on fertilizer (fish-meal). Congress apparently believed that these were fair and reasonable license taxes to be borne by plaintiff, because six years later, when it enacted the act of June 26, 1906, 34 Stat. L. 478, Sec. 259, Compiled Laws of Alaska, supra, it again laid that tax on plaintiff's business.

The Territorial legislature, however, when it laid a license tax on plaintiff's business, must have thought, if it had no ulterior motive, that the Congressional license tax was absurdly low, because it made its license tax on fish oil $2.00 per barrel, or twenty times the tax that Congress had laid, and on fishmeal $2.00 per ton, or ten times the Congressional tax.

A comparative statement of the license taxes

laid on various businesses, including plaintiff's, by the 1913, 1915 and 1917 Territorial acts may be of value in disclosing the real nature of the license tax imposed on plaintiff's business, towit:

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Attorneys at law	.....	$10.00	$10.00*
Doctors	.....	10.00	10.00*
			Including persons practicing medicine, surgery, osteopathy.
Dentists	.....	10.00	$10.00*
*Each member of firm subject to tax			
Automobiles	.....	$5.00	.....
Automobiles operating for hire	.....	.....	$5.00
Bakeries	.....	$15.00	$15.00
Electric light and power plants: Selling light and power to the public	.....	½% of gross receipts in excess of $2,500.	.....
Selling light, power and steam for heat and supplies to the public	.....	.....	½% of gross receipts in excess of $2500 from light, power and steam sold; ½% net profits from supplies sold.
	.....	.....	

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Employment agencies, operating for hire and collecting a fee from employees	.....	$500.00	$500.00
Fisheries: Salmon canneries — Sockeyes and Kings	7c per case	.....	.....
Humpbacks, Cohoes, Chums	½c per case	.....	.....
Kings, Reds, Sockeyes	.....	4c per case	4½c per case
Medium Reds	.....	2c per case	2½c per case
All other Salmon	.....	1c per case	2 c per case
Salteries—On all fish salted or mildcured, except herring	.....	2½c per 100 lbs.	2½c per 100 lbs.

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Fish-oil works, using herring in whole or in part in manufacture of fish oil	.....	.....	$2.00 per bbl.
Fertilizer and fish meal plants, manufacturing fertilizer and fish meal in whole or in part from herring	.....	.....	$2.00 per ton
Fish traps: fixed or floating, including dummy traps	.....	$100.00	$100.00

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Cold storage plants: doing business of:			
$100,000 per annum	$500.00*	$500.00	$500.00
75,000 less than $100,000	375.00*	375.00	375.00
50,000 less than 75,000	250.00*	250.00	250.00
25,000 less than 50,000	125.00*	125.00	125.00
10,000 less than 25,000	50.00*	50.00	50.00
4,000 less than 10,000	25.00*	25.00	25.00
Under $4,000 per annum	10.00*	10.00	10.00
(*The qualification "less than" the larger amount does not appear in the 1913 act.)			

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Laundries: doing business per annum of: More than $5,000	$25.00	$25.00	.....
Over $2,500 less than $5,000	.....	.....	$25.00
$5,000 but less than $10,000	.....	.....	50.00
$10,000 or more	.....	.....	75.00
Furs	½% of gross value	.....	.....
Fishing vessels propelled by mechanical power over 30 tons net and plying or fishing in Alaskan waters, per net ton, custom house measurement	$1.00	.....	.....
Insurance companies	1% on premiums	.....	.....
Express companies	1% of business done	.....	.....

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws 1913	1915	1917
Meat markets, doing business per annum:			
More than $5,000 and less than $10,000	$ 25.00	.....	.....
$ 10,000	50.00	.....	.....
50,000	75.00	.....	.....
75,000	375.00	.....	.....
100,000	500.00	.....	.....
Not less than $10,000 nor more than $25,000	.....	$ 10.00*	$25.00*
Not less than $25,000 nor more than $50,000	.....	30.00*	50.00*
Not less than $50,000 nor more than $75,000	.....	100.00*	100.00*
Not less than $75,000 nor more than $200,000	.....	250.00*	250.00*
Over $200,000 per annum	.....	500.00*	500.00*
(*1915 and 1917—Every separate meat market or establishment considered a separate business.)			

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Mining	½% on net income over and above $5,000	1% of net income in excess of $5,000.	1% of net income in excess of $5,000.
Public scavengers	$50.00	$50.00	.....
Public messengers	$25.00	$25.00	$25.00
Lighterage companies on freight handled or lightered	10c per ton	.....	.....
Lodging houses	$10.00	.....	.....
Reindeer owned by white men	25c per head	.....	.....
Transportation: on every ton freight shipped into or from Territory	10c per ton	.....	.....
Ships and shipping	.....	$1.00 per net ton	$1.00 per net ton
Telephone companies	½% of gross volume of business over $2,400	½% of gross receipts in excess of $1,500.	½% of gross receipts in excess of $1,500.

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Water works: selling water or power to public	.....	1% of gross receipts in excess of $2,500.	1% of gross receipts in excess of $2,500.
Gill nets, per hundred fathoms or fraction	.....	$1.00	.....
Transient and itinerant merchants	$200.00	.....	.....

Hence, it appears that the basis of levying the license taxes on the various businesses, trades, and occupations, is not on any fixed scheme, but in some instances is on a flat rate per annum basis regardless of business done or product produced; in others, a flat rate per annum on a fluctuating scale; in others, a flat rate per annum per unit of product; in others, a fixed percentage on gross receipts in excess of a fixed deduction; in others, a fixed percentage on net profits; but none of these vagaries cause the tax on any other business to approach even within an approximate distance of the tax laid on plaintiff, its business or product.

Taking those businesses, occupations, trades or products, on which it is possible either under the pleadings or the acts themselves to compute the rate of taxation, we find:

Gross Receipts Tax Basis, With Deduction:

Electric light and power plants, selling light, power and steam to the public; ½% on gross receipts in excess of $2,500 deduction;

Telephone companies: ½% on gross receipts in excess of $1,500 deduction;

Water works: 1% on gross receipts in excess of $2,500 deduction.

As opposed to this is the tax on plaintiff's business or product, on which no deduction is allowed: For 1917, 9.31% on gross receipts from

fish oil, and 4.6% on gross receipts from fish meal; for 1918, 5.6% on fish oil, and 2.92% on fish meal. (Record, pp. 5, 6, 16 and 17.)

Flat Rate, Fluctuating Scale, Tax Basis; on Business Done:

Cold storage plants: from 0.25% to 0.5%;

Laundries: from 0.25% to 0.75%;

Meat markets: from 0.13% to 0.25%.

As opposed to this, plaintiff's tax ranged during the years 1917 and 1918 from 2.92% to 9.31%.

Per Unit of Product Tax Basis, Per Annum:

Salmon canneries: from 0.303% to 0.5% for the year 1917; from 0.303% to 0.478% for the year 1918;

Salt and mildcured fish: 0.25%, 1917; and 0.277%, 1918.

As opposed to this, plaintiff's tax per unit of product amounted to: 9.31% on fish oil and 4.6% on fish meal for the year 1917; and 5.6% on fish oil and 2.92% on fish meal for the year 1918.

Net Income Tax Basis, with Deduction of $5,000.00:

Mining: 1% on net income in excess of $5,000.00.

As opposed to this, plaintiff's tax amounted to:

Fish oil: 1917, $8,224.00, or 84% of net profits; in 1918, $5,440.00, or 113.64% of net profits. Hence, it is apparent that if plaintiff had been subject on its fish oil business to the same tax laid on mining, in the year 1918 it would have had

no tax to pay as its net income, assuming that is equivalent to net profits, would have been less than the deductible allowance of $5,000.00; whereas, in 1917, on the same theory, plaintiff would have paid $47.90 taxes instead of $8,224.00 on its fish oil business.

Fish meal: in 1917, $2,074.00, or 8.18% of net profits; in 1918, $1,290.00, or 28.12% of net profits. Hence, using the assumption taken in the illustration relative to fish oil, plaintiff's tax on fish meal for the year 1917 would have amounted to $208.54, or less than one tenth of what it actually paid, namely $2,074.00; and for the year 1918 its net profits (net income) would have been less than the deductible allowance of $5,000.00, and it would have paid no taxes, instead of actually paying $1,290.00.

Net Profits Tax Basis:

Electric light and power plants, on supplies sold; ½%;

Plaintiff's business, fish oil: 84%, 1917; and 113.64%, 1918. Fish meal 8.18%, 1917; and 28.12%, 1918. (Record, pp. 5, 6, 16 and 17).

As stated by the learned trial judge, it thus appears "that there is a gross and patent inequality in the amount of the tax levied on this particular line of business as compared with the tax levied on other lines of business if the allegations of the complaints are true" (Record, p. 29).

VIII.

THE TERRITORIAL LEGISLATION AND THE TAXES IMPOSED BY IT ARE IN VIOLATION OF THE CONSTITUTION, BECAUSE THE LEGISLATURE HAS PLAINLY ABUSED ITS TAXING POWER BY EXERCISING IT, NOT FOR REVENUE, BUT FOR THE PURPOSE OF DESTROYING RIGHTS AND PRIVILEGES ACCORDED TO THE PLAINTIFF BY THE CONSTITUTION AND THE ALASKA ORGANIC ACT.

The license taxes and the legislation enacting them cannot be sustained on the principle that the "power to tax is the power to destroy" (M'Culloch v. Maryland, 4 Wheat. 314, 4 L. ed. 579), because "the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land" (Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 563; Alaska Pacific Fisheries v. Alaska, 236 Fed. 52.)

While this Court has said:

> "Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."

McCray v. United States, 195 U. S. 27, 59, 49 L. ed. 78, 97.

We respectfully urge that this principle does not conflict with the contention that the legislation and taxes in question are unconstitutional, because the legislature was without lawful power to enact the legislation and lay the taxes, for the reasons:

First, because the legislature has imposed the tax on plaintiff's business, but has not laid it on other similar businesses, thus singling out plaintiff's business as the sole business to bear the burden of revenue out of the class to which it belongs, for it is admitted:

> "That although there are other persons and corporations in the said Territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the Territory of Alaska, and that the said business of said other persons and corporations is in all essentials the same as the business of this plaintiff and there are no distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations, and that the levying of a license tax on plaintiff's said business, without levying a similar tax on the manufacture of fish oil, fish meal and fertilizer from fish, other than herring, either in whole or in part, is unreasonable, purely arbitrary, discriminatory and for the purpose of prohibiting and destroying plain-

tiff's said business and industry." (Record, pp. 6 and 17.)

It thus appears that not only was the taxing power exerted without any basis for classification, but that it was a merely arbitrary imposition of a license tax on one business, and not on others of the same class, although there are no distinctions between them, which is in violation of the 5th Amendment of the Constitution because it takes plaintiff's property without due process of law and, without due process of law, singles it out for a tax without levying a like tax on other businesss of the same class.

In McCray v. United States, supra, this Court said:

> "Conceding, merely for the sake of argument, that the due process clause of the 5th Amendment would avoid an exertion of the taxing power which, without any basis for classification, aribitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand."

This Court held that such concession would be inapposite in that case because there was a distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, but in this case as shown it is admitted that there is no distinction between plaintiff's fish oil and fish meal business and the fish oil and fish meal business conducted by other

persons in the Territory on whom no tax is laid.

We urge that it is violative of the Fifth Amendment on the theory that Alaska Territorial legislation is dependent and not wholly separate legislation from Congressional legislation, that is to say, that the Territorial Legislature deriving as it does its powers from Congress is not a separate sovereign legislature and has no actual separate entity apart from its creator (Dakota v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355, 357), but, if this theory be unwarranted, then we urge that the due process clause of the Fourteenth Amendment has been violated.

Second, because the Territorial Legislature has no lawful power to prohibit plaintiff's business as Congress has specifically reserved to itself by the Organic Act (38 Stat. L. 616) the right to legislate relative to the fisheries of Alaska, and has explicitly withheld from the Territory the power to enact legislation altering, modifying, amending, or repealing the "fish laws of the United States applicable to Alaska" and the "laws of the United States providing for taxes on business and trade," and, regardless of the authority of the Territory to impose additional licenses or taxes, it has no authority to impose such licenses or taxes as will alter, modify, amend or repeal, either directly or in effect, those laws thus reserved from the Territory's legislative authority, and, even if no such restriction existed, that the legislation and taxes are un-

constitutional and illegal because they select plaintiffs' business, although no different than other businesses of the same class, as the sole one to be discriminated against and prohibit and destroy it by a prohibitory tax irrespective of the fact that it is a lawful pursuit, the right to pursue which is guaranteed to plaintiff by the fundamental law of the land.

The premise is admitted that "plaintiff's business is a useful, legitimate and commendable business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States" (Record, pp. 1 and 12).

It is likewise admitted that said taxes:

> "While ostensibly enacted solely as revenue measures, were in fact enacted for the purpose of prohibiting and restraining, under the guise of a revenue measure, this plaintiff from continuing its said business and industry, and to abolish plaintiff's said business and confiscate its property; and that said acts * * * will not produce any revenue for the reason that said tax is so exorbitant, unfair, unreasonable, extortionate, confiscatory and prohibitive that, if said acts * * * be annually enforced, it will entirely prohibit plaintiff and all others from engaging" in said business. (Certificate of Correction, p. 1; Record, pp. 5, 15, 16.)

On a similar contention in McCray v. United States, supra, this Court said:

"Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

"Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction."

p. 63, 195 U. S.; p. 98, 49 L. ed.

But, as we have seen, there is no distinction between plaintiff's fish oil and fish meal business

and the fish oil and fish meal business conducted by other persons in the Territory, and plaintiff's business is admittedly a lawful business, and is protected from the police powers of the Territory by the express limitations of the Organic Act (28 Stat., 616); hence, regardless of what Congress might have power to do in suppressing it, the pro- might have power to do in its suppression, the prohibition of it by the Territorial Legislature is not only unconstitutional but is also beyond the lawfully delegated authority of that Legislature.

Inasmuch as we have also just seen that it is admitted that the prohibition is made under the guise of revenue legislation, but that as a matter of fact no revenue will be produced thereby, we submit that a plain case of perverted abuse of the taxing or licensing power is disclosed similar to that spoken of by this Court in McCray v. United States, supra, when Mr. Justice, now Mr. Chief Justice, White said:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

p. 64, 195 U. S.; p. 99, 49 L. ed.

Or as later said by Mr. Chief Justice White:

"And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

Brushaber v. Union Pac. R'd. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504.

IX.

THE LEGISLATION AND THE TAXES IMPOSED THEREUNDER ARE UNREASONABLE, ARBITRARY, CONFISCATORY AND PROHIBITORY, AND UNJUSTLY DISCRIMINATE AGAINST PLAINTIFF AND ITS BUSINESS, AND ARE IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BECAUSE PLAINTIFF IS DENIED THE EQUAL PROTECTION OF THE LAWS AND ITS PROPERTY IS TAKEN FROM IT WITHOUT DUE PROCESS OF LAW.

It may be urged that there is no inequality because one class of business pays a different, either smaller or larger, tax than some other class of business, but,even though conceding, for the sake of the argument, that the manufacture of fish oil or fish meal may be properly classified as a business as distinguished from a telephone exchange, or mining, or canning, salting or mild-curing fish, there is no reasonableness or justification in classifying the manufacture of fish oil or fish meal from herring in whole or in part as a business distinguished from manufacturing fish oil or fish meal from any other kind of fish in whole or in part, and laying an extortionate, prohibitory tax on the former, and none whatsoever on the latter.

The legislature might just as well classify the bakery business into the busines of baking bread from wheat in whole or in part, and the business of baking bread from rye, barley or some other grain, and, instead of laying an annual tax of $15.00, as it did, on all bakeries doing a business in excess of $500.00 per annum, levy an extortionate tax on the baker making bread in whole or in part from wheat, and entirely exempt the baker who makes bread from any other grain or vegetable. Such distinction would be entirely as fair as a discrimination between fish oil and fish meal made from herring in whole or in part, as opposed to fish oil and fish meal made from any other fish.

Equally unreasonable classifications would have been to have classified attorneys-at-law as corporation lawyers, damage lawyers, trial lawyers, or of-five lawyers, or electric light and power plants on the basis of whether they produced their light and power from coal, wood, water, or oil, and not on the basis of what they sold; or cold storage plants on the basis of whether they froze their fish by natural or by artificial ice, or whether they froze halibut as distinguished from herring, cod or sablefish; or meat markets as to whether they handled beef, mutton or pork.

There are, of course, many kinds of oil, for instance, animal oil, vegetable oil, and mineral oil; and countless subdivisions such as cottonseed oil, olive oil, whale oil, petroleum, castor oil. (See list, Funk & Wagnall's New Standard Dictionary). But there is no defined oil known as herring oil or herring fish oil, and fish oil itself is a generic term covering oil produced from marine mammals or fish, except that it is sometimes used specifically to mean cod-liver oil (idem); in fact the legislation in question does not presuppose that any distinction exists between the fish oil produced by plaintiff and that produced from any other kind of fish, because the legislature laid the tax on oil made in whole or in part from herring, that is to say, made either wholly from herring, or made partly from herring and partly from some other fish; hence, the Legislature recognized that fish oil is a generic term,

and that fish oil is the resultant product of plaintiff's business regardless of whether herring alone is used to make it, or nine parts salmon and one part herring is used, or five parts salmon, four parts eulachan, and only one part herring; so that, as a matter of fact, the product, whether oil or meal, is subjected to the tax if it contain any part of herring, however slight, in its manufacture regardless of the percentage of other fish that might be used therein; thus, denoting that the legislature in fact by its tax intended to prohibit and prevent the use of herring for fish oil and fish meal, and not to raise revenue thereby.

There perhaps may be conjectured a distinction between canned salmon and salted salmon sufficient to warrant a different license tax basis, in that, while made from the same basic matter, salmon fish, one is manufactured in a cannery, the other in a saltery, by different processes and appliances, with a resultant different product, but a suppositious case, to that at bar, would be to discriminate between "sea-island cotton seed oil" and "upland cotton seed oil," prohibitorily taxing one and exempting the other, or to classify raspberry juice, the production of which is a large industry on the Pacific coast, as "red raspberry juice" and "black raspberry juice," and extortionately tax the one and exempt the other, even though made by the same processes and appliances, from the same basic plant or berry, and resulting in the same

product.

The Territorial legislature in exercising its power, if any exists, to classify plaintiff's business would have to hinge the differences or resemblances used as the basis for the classification upon the object which it has in view and the ultimate classification reached or made, although it might be narrow or wide according to that object, would have to be reasonable and logical, and not arbitrary.

This Court, speaking through Mr. Justice McKanna, in a comparatively recent case, said:

> "Classification is not different in law than in other departments of knowledge. 'It is the grouping of things in speculation or practice because they "agree with one another in certain particulars." ' Billings v. Illinois, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272. Upon what difference or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong, it would have only arbitrary relation to the purpose and province of legislation."
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> *Tanner v. Little*, 240 U. S. 369, 382, 60 L. ed. 691, 701.

Again this Court said:

"Arbitrary selection, it has been said, cannot be justified by calling it classification."

S. R. Co. v. Greene, 216 U. S. 400, 417; 54 L. ed. 536, 541.

In Cotting v. Kansas City Stock Yards Co., infra, this Court held that a Kansas statute in which the classification was not based upon inherent differences in the character of the business, but was a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each might do, was not constitutional and amounted to a denial of the equal protection of the laws. While the discrimination was upon volume of business done, we respectfully submit that the language of the Court is amply broad enough to warrant the conclusion that the decision would have been the same had the statute been based solely on a distinction as to whether Hereford cattle instead of Galloway cattle were being handled. However, such is the sole distinction used as a basis in this case, namely, whether the fish oil and fish meal is manufactured from herring, in whole or in part, or is manufactured from some other kind of fish, disregarding the fact that there are no inherent differences in the character of the business.

The pleadings admit "that although there are other persons and corporations in the said Terril tory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as

as they do not use herring, either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the Territory of Alaska, and that the said business of said other persons and corporation is in all essentials the same as the business of this plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations; and that the levying of a license tax on plaintiff's said business, without levying a similar tax on the manufacture of fish oil, fish meal and fertilizer from fish, other than from herring in whole or in part, is unreasonable, purely arbitrary, discriminatory and for the purpose of compelling plaintiff to cease its said business and industry." (Record, pp. 6 and 17).

> But "Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."
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> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 109.

See also:

Cooley's Constitutional Limitations, 5th ed., 484, 486.

State v. Haun, 61 Kan. 146;

Yut Wo v. Hopkins, 118 U. S. 356;

In re Yot Sang, 75 Fed. 983.

The want of any tax on the use of herring for any other purpose, such as canned, mildcured, smoked, salted, sardines, and for bait, strengthens the conclusion that the tax was not laid in reality, but only ostensibly, for revenue, and, furthermore, that it was a direct legislative attack on plaintiff's business alone, because it is apparent that, no matter how the Legislature considered plaintiff's use of herring in its business, the Legislature at the same time fostered the use of herring for all other purposes, except that use made of them by plaintiff, by causing the businesses using herring for other purposes to bear no part of the burden of the revenues.

Although the legislature thus exempted from taxation all other uses and preparations of herring, it so refined its discrimination against plaintiff that, while the manufacturers of fish oil and fish meal from all other kinds of fish are also entirely exempted from license taxation, plaintiff, upon its using even one part herring for its product, becomes, under the same legislation, subject to an extortionate, prohibitory tax.

A somewhat similar discrimination was spoken of by Mr. Justice Brown in a suppositious case in American Sugar Refining Co. v. Louisiana, wherein this Court said:

> "The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax."
>
> *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89.

This legislation under view exempts the fisherman or canneryman who uses herring for any purpose other than the manufacture of fish oil and fish meal (fertilizer), and also exempts the person who manufactures fish oil and fish meal (fertilizer) from any other fish than herring, but subjects to a prohibitory tax the person who manufactures fish oil and fish meal (fertilizer) from herring either in whole or in part.

And if the latter should not pay this tax then he is made a criminal and subject to heavy fine and penalties for Chap. 74, Alaska Session Laws, 1917, Section 2, 6th paragraph, reads:

> "Any person, firm, or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent added

for which the defendant was liable. Each month or fraction of a month in which business is carried on in violation of this Act shall be deemed a separate offense and prosecution therefor may be by information filed by the Attorney-General or authorized legal counsel of the Territory in any Court of competent jurisdiction, and upon conviction the Court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil actions or by imprisonment at the rate of one day for each two dollars of such fine and costs. * * * * *."

Whereas, if he uses no herring—but it will be noted he must not use the slightest part of that kind of fish—then he is deemed a praiseworthy citizen to the extent that he is not even required to bear a part of the burden of the revenues of the Territory, but his fish oil and fish meal is entirely exempted from a license tax.

The resulting discrimination is analogous to that condemned by the Supreme Court of Oregon in State v. Wright, wherein that Court said:

"A statute which directly or by implication grants special privileges, or imposes special burdens, upon persons engaged in substantially the same business, under the same conditions, cannot be sound, because it is class legislation, and an infringement of the equal rights guaranteed to all * * *. A peddler could go about the country selling to the same customer a stove, buggy or fanning mill, and groceries, dry goods, or any other article not within the prohibited list, and, under this statute, if he had no license, part of his sales would render

> him a criminal, while part would be praiseworthy and proper. Such a classification is purely arbitrary, and plainly denies the equal protection of the law to those against whom it is directed. The constitutional objection to it is that it operates unequally, in that it requires certain persons engaged in peddling a few enumerated, useful articles to obtain a license, and exempts others engaged in the same business, and, therefore, is void. * * * *. It is true a state may impose a tax on, or require a license from, persons engaged in certain callings or trades, without being bound to include all persons or all property that may be legitimately taxed for governmental purposes. But the classification must apply alike to all engaged in the business or occupation."
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> *State v. Wright*, —— *Ore.* ——, 100 Pac. 296, 21 L. R. A. (N. S.) 349, 353.

The discrimination under the admitted facts plainly denies and operates to deny plaintiff the equal protection of the laws.

This Court said in Connolly v. Union Sewer Pipe Co.:

> "A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it

cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562, 563.

And as said by this Court in Cotting v. Kansas City Stock Yards Co.:

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111, 112.

And as also said by this Court:

"On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated."

Atchison, Topeka &c. R. v. Matthews, 174 U. S. 96, 104;

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids it."

Gulf, &c. R'd Co. v. Ellis, 165 U. S. 150, 159.

And this Court said, in a tax case arising in Pennsylvania:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities

for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

Bell's Gap Rd. Co. v. Pennsylvania, 134 U. S. 232, 237.

And, while we contend that the Territorial legislation is void on its face under the admitted facts, in any event, even if that were not true, we urge that the legislation is void because, under the admitted facts, the actual administration and enforcement of the legislation operates to arbitrarily take plaintiff's property without due process of law, and prohibits plaintiff from engaging in and exercising its lawful privilege and right to engage in a lawful business, and therein denies plaintiff the equal protection of the laws.

As said by this Court in Yick Wo. v. Hopkins, Mr. Justice Mathews speaking:

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civ-

ilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * * * * * * (p. 370.)

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinance in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal

justice is still within the prohibition of the Constitution. (p. 373.)."

Yick Wo v. Hopkins, 118 U. S. 356, 370, 373, 374.

We also refer to:

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 925;

Magoun v. Illinois, &c., Bank, 170 U. S. 283;

Tanner v. Little, 240 U. S. 369, 60 L. ed. 691.

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 696.

Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 679;

Am. Sugar Refining Co. v. Louisiana, 179 U. S. 69, 92;

Missouri v. Lewis, 101 U. S. 22, 31;

Haynes v. Missouri, 120 U. S. 68, 71;

Gibbons v. Ogden, 9 *Wheat.* 23, 6 L. ed 1, 210;

Sinot v. Davenport, 22 How. 227, 243;

Missouri &c., Ry. v. Haber, 169 U. S. 613, 626;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169;

Mugler v. Kansas, 123 U. S. 661;

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 1343;

Allgever v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835;

Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626;

So. R. Co. v. Greene, 216 U. S. 400, 417, 54 L. ed. 536, 541;

Ex parte Hutchison, 137 Fed. 949, 950;

In re Yot Sang, 75 Fed. 983;

There are also many State decisions. Among them:

Oregon v. Wright, 100 Pac. (Ore.) 296, 21 L. R. A. (N. S.) 349, 352;

Hager v. Walker, 107 S. W. (Ky.) 254, 15 L. R. A. (N .S.) 195, 198;

Sallsbury v. Equitable Purchasing Co., 117 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114;

State v. Whitcom, 122 *Wis.* 110, 99 N. W. 468, 40 L. R. A. (N. S.) 1208;

Price v. Illinois, 193 Ill. 114, 55 L. R. A. 589, 590;

Winston v. Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 165;

Ex parte Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588;

State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789;

Scriven v. Lebanon, 99 *Kan.* 602, 162 Pac. 307, L. R. A. 1917C, 462;

Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454;

Ottumwa v. Zekind, 95 Iowa 622, 64 N. W. 646, 29 L. R. A. 734;

Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136;

Colorado Springs v. Siman, —— Col. —— 157 Pac. 194;

Ex parte Richardson, —— Cal. —— 148 Pac. 213, 215;

Moffitt v. City of Pueblo, —— Col. ——, 133 Pac. 754.

It is admitted that the license taxes are prohibitive (Record, pp. 2, 3, 4, 5, 7, 13, 14, 15, 16, 17, Cert. of Corr. p. 1). But even if it were not so admitted, the taxes themselves are so enormous as to lead to the inevitable conclusion that they must necessarily in effect be prohibitive. Being admittedly 84% on fish oil net profits in 1917, and 113.64% in 1918, and 8.18% on fish meal net profits in 1917, and 28.18% in 1918, the taxes involved are comparable with the "1-3 of the net earnings tax" declared by the Supreme Court of Kentucky, in Sallsbury v. Equitable Purchasing Co., to be illegal because of its prohibitive character. That Court said:

> "While the amount of the license as compared with the profits made by those engaged in the taxed occupation cannot be accepted as a true criterion in determining the validity of

> the ordinances in all cases, still, when it is admitted, as is done here, that the license fee exacts practically one-third of the net earnings of the largest business of any individual engaged in the taxed occupation within the taxing district, we cannot get away from the impression necessarily created that the license is prohibitive and, therefore, illegal."
>
> *Sallsbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, 1116.

And even though we concede for purpose of argument "That net profits is necessarily a question of economy and efficiency of method," as stated by the learned trial court in his opinion (Record, p. 26), such concession could have no weight on the question before the court because the demurrer admits not only that plaintiff's business "is conducted, and it is necessary to conduct said business on a close and narrow margin of profits" (Record, pp. 2 and 12), but also that neither plaintiff nor any one else "could continue to remain in said business and pay said tax, and if it be required to pay said tax each year plaintiff will be obliged to suspend its operations and cease from said business and industry." (Record, pp. 6, 7 and 17.)

The legislature itself, moreover, by this same act, Chapter 74, Session Laws 1917, supra, apparently deemed that, though a tax on net profits might embrace the question of economy and efficiency of method, such feature was not so vitally ob-

jectionable that taxes should not be laid on a basis under which that factor would necessarily be involved, because it established the license tax on electric light and power plant on a bsis of ½% of the net profits from supplies sold. But even if some other manager could have conducted plaintiff's business so much more economically and efficiently that he would have made twice the net profits which plaintiff made, the license tax that he would have had to pay for the year 1918 on fish oil would have amounted to 56.82% of the net profits. This percentage, moreover, would have been paid, not on the fair method of progression as in the much criticized federal income tax (Atlantic Monthly, July, 1920, p. 112, Reflections on the Income Tax by Bernhard Knollenberg), not on a tremendous income, but on a small business at a flat rate.

We submit that no argument is needed that a business conducted to make money cannot operate and pay a tax of 84% of its net profits, let alone 113.64% thereof. And so far as continuing operation, there is scant difference between taking 113.64% of the net profits or 1000% thereof. The only difference would be as to how much of other assets would be left after selling sufficient of them to pay the excess over 100%.

It being illogical to believe that plaintiff can pay such a tax and continue its business, we must come to the conclusion that the law, if enforced, will not produce any revenue for the Territory,

nor for the federal government, because naturally the non-payment by plaintiff of all license taxes will naturally follow the closing of its business. Hence, the result is, although Congress has legalized plaintiff's business by the Acts of June 6, 1900, and June 26, 1906, supra, under which taxes are paid into the National Treasury to be expended in the Territory (Binns v. U. S., supra), that the local legislature, under an assumption of delegated power, has passed an act which will, if enforced, not only deprive the federal government of the revenue which it would otherwise derive from plaintiff by virtue of the Congressional license taxes under those acts, but which also in actual operation repeals the Congressional Acts, because the territorial act, by the enormity of its license tax, prohibits plaintiff from continuing in the very business which Congress has in effect said plaintiff may conduct; or, to state it another way, the result is that the federal government, which is the grantor of the legislative power, will suffer loss by the acts of the territorial government, which is the grantee of the power, in that, whereas prior to the delegation of the power the grantor received revenue from plaintiff by way of license taxes under the acts of June 6, 1900, and June 26, 1906, supra, since the delegation of the power this revenue is cut off at its fountain-head because, when plaintiff's business is destroyed and it is forced by the territorial act to cease from that business, it will no longer pay, or

be subject to paying its license taxes to the federal government, although those license taxes were specifically kept in force by the identical act (Organic Act of August 24, 1912 [38 Stat., 616]), from which the territorial legislature derives whatever authority it may have to impose any license taxes on the business carried on by plaintiff.

The Ninth Circuit Court of Appeals in the Alaska Pacific Fisheries v. Alaska case said:

> "And thus by the Organic Act those general provisions for the protection of the fish which we find in the act of 1906, were kept in force without possibility of alteration, amendment, or repeal by the Territorial Legislature, and the specific license tax provided by the Act of 1906 was kept in force, * * * *."
>
> *Alaska Pacific Fisheries v. Alaska*, 236 Fed. 52 at 57.

Not only did Congress thus recognize plaintiff's business as legitimate, but Congress by the Act of June 26, 1906, supra, authorized plaintiff to carry on its business in the Territory of Alaska. This conclusion, we believe, is logical, for the reason that the Congressional Acts of June 6, 1900, and June 26, 1906, supra, are not to be confused with the legislation under consideration in the License Tax Cases, 5 Wall. 462, 471, and analogous cases, because in those cases there were two sovereignties involved, a national sovereignty and a state sovereignty; whereas, in the instance case, Alaska, being a territory, as this Court said, in United States v.

McMillan, it has no legislative authority of its own.

> "But it is equally indubitable that Congress, having the entire dominion and sovereignty, national and municipal, Federal and State, over the territories of the United States, so long as they remain in the territorial condition, may itself directly legislate for any territory, or may extend the laws of the United States over it, in any particular that Congress may think fit. As said by Chief Justice Waite, speaking for this court, 'Congress may not only abrogate the laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States.' National Bank v. Yankton County, 101 U. S. 129, 133. See also Mormon Church v. United States, 136 U. S. 1, 44; Shively v. Bowlby, 152 U. S. 1, 48, and other cases there cited."

United States v. McMillan, 165 U. S. 504, 510, 511.

See also: *Binns v. United States*, 194 U. S. 486, 491;

Simms v. Simms, 175 U. S. 162, 168.

And as said by Mr. Justice Mathews, speaking for this Court, in Murphy v. Ramsey, viz:

> "The personal and civil rights of the inhabitants of the Territory are secured to them,

> as to other citizens, by the principles of constitutional liberty which restrain all the agencies of the government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

Murphy v. Ramsey, 114 U. S. 44.

Inasmuch as Congress has plenary power to legislate for the Territory of Alaska, and may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory (Binns v. United States, supra), we urge that Congress not only had the power to, but that it actually did by its acts of June 6, 1900, and June 26, 1906, authorize plaintiff to carry on the fishing business and the manufacture of fish oil and fertilizer (fish meal), in the Territory of Alaska, and that, so long as plaintiff continues to pay the Federal license taxes so imposed upon it by Congress and until the repeal by Congress of its acts, plaintiff holds that right. The language of this Court in the License Cases, supra, is applicable, wherein Mr. Chief Justice Chase said:

> "Thus, Congress having power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and

extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee."

License Tax Cases, 72 U. S. 462, 5 Wall. 462, 18 L. ed. 496, 500.

And even though Congress be admitted to have only reserved a revisory power over Territorial legislation (Miners' Bank v. Iowa, 12 How. 1, 8, 13 L. ed. 867, 870; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 64, 53 L. ed. 695, 698), such concession is inapposite to this case, because, this is not a case wherein the legislature has first enacted a law and subsequently a contradictory act passed by Congress, but Congress has in effect a law at the time of its delegation of powers to the Territorial Legislature, which Congress said the Territorial Legislature should not amend, modify, alter or repeal, and; if in this instance, the territory may so repeal the Congressional act then it would follow that a repeal by the legislature of the entire Alaska Organic Act would not be null and void unless Congress took some affirmative action to so declare such territorial enactment.

If this were a question where under authorized police power the Territorial Legislature had destroyed plaintiff's business because it was a public nuisance or had under such power laid restrictions upon the business which resulted in a prohibition or destruction of the business, we realize that the sit-

uation might be somewhat different, but no such question is presented. Instead, this is a case where unoffending property is taken away without due process of law from an innocent owner.

This Court has held there is a distinction between these two cases.

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."
>
> *Mugler v. Kansas*, 123 U. S. 623, 669, 31 L. ed. 205.

There is no federal or territorial law proscribing plaintiff's business as a nuisance. On the contrary, the demurrer admits that it is a "useful, legitimate, and commendable business and industry and is of use and value to the economic, industrial, and commercial welfare of the Territory of Alaska and the United States of America," and that it produces valuable and useful products including "fish oil, fish meal, fertilizer, glycerine, salt fish and by-products." (Record, pp. 1, 2, 12 and 13.) Hence, the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with, or impose unusual and unnecessary restrictions upon that business.

Lawton v. Steele, supra.

X.

A CLASSIFICATION CANNOT BE SUSTAINED WHICH IS BASED UPON A POLICE REGULATION WHERE THE OBJECT SOUGHT TO BE ACCOMPLISHED IS OSTENSIBLY THE RAISING OF REVENUE, AND TO SUSTAIN IT WOULD BE EQUIVALENT TO DECLARING IT LEGAL UPON A BASIS AND FOR A REASON THAT DOES NOT EXIST IN FACT.

Granting, for argument's sake, the correctness of the statement of the learned trial court, i. e.: "It is a well known fact that the salmon feeds largely on the herring" (Record, p. 29), we submit that such concession would not afford a ground for an arbitrary, confiscatory, and destructive classification of plaintiff's business, because, in the first place, it is logical to assume that Congress would be as well advised thereof as the Territorial Legislature and, if Congress considered it an evil for plaintiff to use herring in its business and thereby deprive salmon fish of being able to feed thereon, it is not likely that Congress would have recognized plaintiff's business as a legitimate industry for the past twenty years, nor would have Congress by the Organic Act (38 Stat., 616) expressly reserved the power from the local legislature of cor-

recting such evil; and, in the second place, such set of facts has no logical relation to the ostensible object sought to be accomplished by the Territorial Legislature in its acts under question.

The similarity and method of levying or laying the tax by the Alaska Legislature as compared to the method of laying the taxes levied by Congress under the Acts of June 6, 1900 (31 Stat., 331), and June 26, 1906 (34 Stat., 478), will be immediately noted, and it would, therefore, seem that the Territorial taxes are, at least ostensibly, the same kind of taxes as the Congressional taxes, in fact, the Territorial Legislature presumably laid them under the limitation in Section 3 of the Organic Act (38 Stat., 616), that "provided, further, that this proviso shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

This Court in Binns v. United States, in speaking of the Act of June 6, 1900 (31 Stat. 331), said:

> "For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."
>
> *Binns v. United States*, 194 U. S. 491, 492, 493, 494.

The Ninth Circuit Court of Appeals, when Chapter 76, Alaska Session Laws, 1915, was before it, said:

> "It is plain, we think, that our conclusions should be arrived at by assuming that the great object of the legislative act of April 29, 1915, quoted above, was to create revenue, and that in its scheme of licenses taxes the Legislature had in mind provision for the expense of administration of the Territory."
>
> *Alaska Pacific Fisheries v. Alaska*, 236 Fed. 52, 55.

Inasmuch as Chapter 74, Alaska Session Laws, 1917, is practically in form similar to Chapter 76, Alaska Session Laws, 1915, we consider it safe to say that, taken as a whole, the primary and ostensible object of the legislature when enacting that act was to raise revenue. So far as plaintiff is concerned, as we have seen, admittedly no revenue will be raised by the act because plaintiff is prohibited by the tax from carrying on its business and it is subject to no license tax, either Federal or Territorial, if it does not produce a product. (Record, p. 15, Cert. of Corr. p. 1.)

But, if the object of the act was to raise revenue, then the legislature could not base its classification of plaintiff's business upon a conceived state of facts that by plaintiff's use of the herring the salmon fish were deprived of their natural food, and, because of this resultant harm or injury, discriminate against plaintiff's business as an evil busi-

ness and therefore one to be prohibitively taxed, for the reason that classification necessarily is dependent upon the object in view (Tanner v. Little, supra) and, if that object is revenue, the classification cannot be made to hinge upon police supervision. Otherwise, the legislature would have authority to pass an act for the ostensible purpose of raising revenue, but to use the act to regulate or entirely prohibit, and this Court has said that the corollary of this may not be done, viz.:

> "To uphold it in such a case as this is to say that it may be passed for one purpose and used for another, passed as a police inspection measure and used for the purpose of raising revenue, that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure the Court must take it as such, and hold it valid, although resulting in a rate of taxation, which, if carried out through the country would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that does not exist in fact."
>
> *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 72.

A discrimination, based on the theory that plaintiff should be prohibited by enormous tax from using herring because the latter are food for salmon, we respectfully submit could have no relation to an objective of raising revenue, but, in fact, could only

relate to such an object or purpose as it is admitted was the real intent of this legislation, namely, the prohibition of the plaintiff's business. Having no relation to the ostensible object of raising revenue, a discrimination based upon that fact is unconstitutional even though the selection might not be obviously unreasonable and arbitrary.

This Court has said:

> "Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."
>
> *Atchison &c. R. Co. v. Mathews*, 174 U. S. 74, 105.

There are many other decisions of this Court so holding. Inter alia:

Mugler v. Kansas, 123 U. S. 623, 661.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560, 561;

Gulf &c, Ry. v. Ellis, 165 U. S. 150, 155, 159, 160, 165;

Cotting v. Kansas City Stock Yards Co., supra;

Magoun v. Illinois &c. Bank, 170 U. S. 283;

American Sugar &c. Co. v. Louisiana, 179 U. S. 89;

Austin v. Tennessee, 179 U. S. 343, 344;

Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626;

McLean v. Arkansas, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep 206.

XI.

A CLASSIFICATION, REGARDLESS OF WHETHER REASONABLE OR LOGICAL, CANNOT BE SUSTAINED WHERE IT IS MADE FOR THE PURPOSE OF PROHIBITING A BUSINESS WHEN THERE IS AN ABSOLUTE WANT OF AUTHORITY TO PROHIBIT THAT BUSINESS, AND SUCH CLASSIFICATION IS VOID.

Assuming, however, that the Territorial Legislature considered it an evil for plaintiff to use herring in its business because the herring would otherwise constitute a food for salmon, and that for that reason the legislature could so classify plaintiff's business for revenue purposes that prohibitory taxes would fall upon it, then it is equally true, should the legislature consider it an evil to catch salmon for canning purposes in Alaskan waters during any year or at any time, the legislature could, with a view of preserving that species of fish from diminution by prohibiting the catching of them during those periods, lay a tax on each case of salmon enormous enough to absolutely prohibit any one from catching or canning any salmon whatsoever, and thereby accomplish by means of a prohitive

tax, laid under the guise of a revenue measure, an object for whose accomplishment it was without legislative power. And, if the legislature did lay such an enormous license tax on each case of canned salmon that every one was absolutely prohibited from catching and canning salmon, could it be said with sincerity that the legislature had not thereby in effect altered, amended, modified and repealed the "fish laws of the United States applicable to Alaska?" Again, if the legislature can thus indirectly prohibit the fishing business in Alaska, why can it not directly prohibit plaintiff from continuing its business, instead of taking the roundabout method of a confiscatory license tax?

The answer is necessarily contained in the fact that the legislature realized that there was another essential element to be considered in the exercise of its legislative functions, namely: authority, because:

> "Of course, an element to be considered is the authority of the legislature over the subject matter. * * * *"

Rast v. Van Deman & Lewis Co., supra.

Whatever express authority the legislature had to lay a license tax upon the business conducted by plaintiff is doubtless based upon the limiting clause in Section 3 of the Organic Act of August 24, 1912 (38 Stat., 616), "provided, further, that this proviso shall not operate to prevent the legislature from

imposing other and additional taxes or licenses." This proviso would not warrant the legislature in imposing taxes or licenses so enormous as to be prohibitory, because, regardless of whether this is a limitation or a grant of authority, a grant to impose fees for the purpose of revenue does not warrant the enactment of prohibitive legislation thereunder, and, if it did, it would present a paradox, in that, the purpose for which the grant was authorized would be used for the purpose of defeating its very ends, and would result in no revenue being produced, or, as stated in Cooley on Taxation, 2nd ed., 597, 598:

> "If a revenue authority is what seems to be conferred the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purpose of revenue would not warrant their being made so heavy as to be prohibitive."

The consideration of this element of authority brings us to the clearly demonstrable proposition that the Territorial Legislature was entirely without authority to enact legislation which has the effect of prohibiting plaintiff's business, because in so doing it unquestionably either modifies, amends, alters, or repeals the Congressional Acts of June 6, 1900, and June 28, 1906, supra, the modification, amendment, alteration and repeal of which Con-

gress expressly inhibited in the Organic Act of August 24, 1912, supra.

If the legislature has power under the clause:

> "Provided, further, that this proviso shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

to do these things and thereby alter, amend, modify, or repeal the "fish laws" or the "laws providing for taxes on business and trade," it can scarcely be refuted that the legislature also has power by virtue of the proviso to alter, amend, modify or repeal the customs, internal-revenue, postal, game, fur-seal, fur-bearing, and other general laws of the United States applicable to Alaska, because the limitations against these latter classes of laws are the same as against the "fish laws" or "laws providing for taxes of business and trades," for said Section 3 of the Organic Act of August 24, 1912 (38 Stat., 616), supra, makes one general limitation against modifying, repealing, altering or amending all these laws, in the following language:

> "That except as herein provided all laws, now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature: Provided, That the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applica-

ble to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled, 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools and the care and support of insane persons in the District of Alaska and for other purposes, approved January twenty-seven, nineteen hundred and five, and the several Acts amendatory thereof.'"

To illustrate what might occur if the Territorial Legislature has such power:

There are postoffice clerks and employees in many of the postoffices of the larger Alaskan towns. Suppose, the local legislature under the proviso for imposing other and additional taxes or licenses, should lay a tax of $2,000 per annum on the occupation or business of being a postoffice clerk, and that the postoffice department was, as it would necessarily be, thereby prevented from employing clerks in the Territory, resulting in that department's being unable to conduct its business. Would it be said for a moment that the legislature had not usurped the power of Congress, or that it had not, in effect, altered, amended, modified or repealed the postal laws? The same illustration may be used with the customs. Or, again suppose a prohibitory license tax was placed on the occupation of killing seals, and that the federal government was thereby prevented from employing any one in the Territory to make the annual kill of seal on the Pribiloff Islands. Would that not be in effect a repeal of the

fur-seal laws? Probably many more practical examples could be given to show that if the power to impose other and additional taxes or licenses is unlimited that the Territorial Legislature could enact such prohibitory license taxes as to thereby alter, modify, amend or repeal the very classes of laws which Congress has said it should not alter, modify, amend or repeal. But if the Legislature should so attempt to alter, amend, modify or repeal the customs, internal-revenue, postal and fur-seal laws, or laws relating to fur-bearing animals, the law would fall of its own absurdity as it would be equivalent to giving the agent a legislative discretion superior to its principal; the dependency a power at least equal to, if not greater than, its sovereign, although, as said by this Court, speaking by Mr. Justice Bradley, in Snow v. United States:

> "The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government."
>
> *Snow v. United States*, 18 Wall. 317, 85 U. S. 317, 21 L. ed. 784, 785.

It may be asked then: What did Congress mean when it said the Territorial Legislature might impose other and additional licenses and taxes?

To us it appears highly improbable that Congress thereby meant that the Territorial Legislature had power to pass an enactment prohibiting the District Court for Alaska from any longer collecting the license taxes provided by either the Acts of March 3, 1899, June 6, 1900, or June 26, 1906, or eliminating any of the trades and businesses listed in any of those acts from paying the license tax therein provided. Such, however, is the result of the legislation actually enacted, because the demurrer admits that plaintiff will be put out of business (Record, pp. 4, 7, 15, 17, Certificate of Correction, p. 2) if it be compelled to pay the Territorial tax, and, if plaintiff be put out of business, it is self-evident that it will no longer produce fish oil or fish meal, and, therefore, will not pay any license tax on those products under the federal acts to the District Court. Thus, by indirection, the Territorial legislation has as effectually amended, modified, altered and repeal the laws of the United States providing for taxes on business and trade and the fish laws of the United States, so far as the business engaged in by plaintiff is concerned, as though the legislation had in express words said: No license tax shall be hereafter paid by, nor shall the District Court hereafter collect any license tax from, persons manufacturing fish oil and fish meal in Alaska.

While we do not believe that the proviso meant, as was held in Alaska Pacific Fisheries v. Alaska,

236 Fed. 57, that the Territorial Legislature might impose license taxes on the same businesses, trades or occupations additional to those already imposed by Congress, it does seem probable that Congress realized that the Territorial legislature would notice that there were many lines of goods, articles of commerce, businesses and trades in Alaska on which no license tax was laid by Congress by either of the Acts of June 6, 1900, or June 26, 1906, supra, but which should pay and on which the legislature should have the power to lay a license tax, not only in fairness to the Territory, but also in fairness to those businesses or trades which were already bearing part of the expenses of the Territory by paying a license tax under the Congressional acts, and, in order to clearly show that it did not intend to take away that power, inserted this proviso as a limitation upon its own limitation as to the powers given the Legislature. There were many such, as a comparison of the Congressional Acts with the Territorial acts will show. Among them, to mention a few, were laundries, meat markets, bakeries, employment agencies, telephone companies, public scavengers, and public messengers. But, assuredly Congress did not intend that the Territorial Legislature might impose other and additional licenses and taxes on the same businesses and trades on which Congress had laid license taxes by the acts of June 6, 1900, and June 26, 1906, supra, so confiscatory and enormous as to prohibit the conduct of those businesses

or trades, because it is not logical that the sovereign legislature, having just expressly limited the power of the dependent legislature as not extending to amending, modifying, altering or repealing the very laws by which those Congressional license taxes were laid, would in the same breath add a proviso removing the restriction just laid and authorizing the local legislature to levy such an enormous, prohibitory, and confiscatory tax that the collection thereof would amend, modify, alter or repeal those same laws relating to businesses and trades.

And we submit that the Territorial act must be held void as to plaintiff because the Territorial Legislature had no authority to deal with that at which the legislation was aimed, because, while it is true that:

> "The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught have been repeatedly upheld by the courts."
>
> *Lawton v. Steele*, 152 U. S. 133, 138, 38 L. ed. 385.

Congress has expressly reserved this power to itself in the Organic Act of August 24, 1912, 38 Stat. L. 616, as hereinbefore noted. This reservation is not inconsistent with the reservation of almost equal

scope in the general act relative to territories, viz: the Act of June 30, 1886, 24 Stat. L. 170, providing:

> "That the legislature of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * the protection of game or fish, * * *"

The Legislature itself at the same session at which it laid the prohibitive tax on plaintiff's business recognized its limitations of power in respect to the "fish laws," and, if we may be permitted to refer thereto, passed Senate Joint Memorial No. 5, Alaska Session Laws 1917, p. 231, and, after referring to House Bill 17499 introduced August 18, 1916, by Representative, now Secretary of Commerce, Alexander, petitioned:

> "And we would further appeal to Congress to grant the people of Alaska the right to control and regulate our own fisheries."

Hence, these prohibitory taxes must be void and null; otherwise, the anomaly exists that the Territorial Legislature may, under its police power, exercise control over the fisheries laws of Alaska enacted by Congress, although the power to do so is expressly withheld from it, by subterfuge and indirect method of laying a prohibitory license tax thereon under its delegated power to impose other and additional license taxes but for the purpose of regulating the business out of existence.

And, regardless of whether the classification of the manufacture of fish oil and fish meal from herring in whole or in part as distinguished from the manufacture of fish oil and fish meal from any other kind of fish, is a logical, appropriate, or scientific classification, if there was a want of authority in the Territorial Legislature to make the classification, it cannot be sustained.

This Court has directly passed on this proposition, viz.:

> "If there is no such authority, a classification, however logical, appropriate ,or scientific, will not be sustained."
>
> *Tanner v. Little*, 240 U. S. 369, 383, 60 L. ed. 691, 701.

We respectfully urge that plaintiff is well warranted, in the light of the conceded fact that the tax on its business is an arbitrary and confiscatory tax, in earnestly beseeching this Honorable Court to carefully consider whether or not plaintiff has not been deprived of inherent and fundamental constitutional rights by the Territorial Legislature in the guise of a tax for revenue but in reality for the purpose of taking away those rights under the mistaken theory that the judicial power will say that there is no express authority for the judiciary to protect them. In other words, that the case has now arisen and is presented in this case, wherein the language of Mr. Chief Justice White in Knowlton v. Moore is clearly applicable, namely:

> "If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."
>
> *Knowlton v. Moore*, 178 U. S. 41, 109, 110; 44 L. ed. 969.

It therefore seems that this case presents admitted facts clearly disclosing that the Territorial Legislature has not only usurped the power delegated to it by Congress, but that it has gone further and enacted legislation aimed at the prohibition of the making of fish oil and fish meal from herring in whole or in part (Record, p. 15, Certificate of Correction, p. 1.). If such be the fact, then the legislation is void, because there was no legislative authority to deal with that at which the legislation was aimed.

> "The statute was held void because there was no authority to deal with that which the legislation was aimed."
>
> *Tanner v. Little*, 240 U. S. 360, 388, 60 L. ed. 691, 701.
>
> *Truax v. Rich* 239 U. S. 33, 60 L. ed. 131.

Otherwise, we have a case where taxation has been used indirectly to accomplish the confiscation of plaintiff's property and the prohibition of its business, although the legislature has been express-

ly inhibited from exercising the power of taking that property without compensation and from prohibiting that business, regardless of whether it might believe that action for the public good. This, we submit, is supported by no decisions of this or any other court.

> "Doubtless, whenever property may be taken outright by the government without compensation, or where an occupation may be prohibited for the public good, the power of taxation may be resorted to, to accomplish the same results. All the cases where confiscatory taxation have been upheld are of this character. Where the right of confiscation or of prohibition does not exist upon other grounds, it is believed that taxation may not be used indirectly to accomplish such results."
>
> Const. Law, 12 Am. L. & P., p. 198 (by Prof. James Parker Hall, Chicago University.)

And the principle announced by this Court in Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357, 60 L. ed. 679, 687, viz:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts can be reasonably conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."

does not obviate the conclusion that an arbitrary distinction has been made in the case at bar, because the facts so to be or thus conjectured must bear upon the object which the legislature had in

view when it enacted the tax (Tanner v. Little, supra), and no state of facts can be conceived in this case logically bearing on the purported object of revenue, but they all relate to a prohibitory purpose, and it is essential that a lawful authority must exist to warrant the Legislature prohibiting the plaintiff's business, either by police regulation or by prohibitory tax, otherwise the legislation would be enactment which the Legislature had no power to make.

XII.

THE WANT OF POWER OF THE TERRITORIAL LEGISLATURE TO PROHIBIT PLAINTIFF FROM CONDUCTING ITS LAWFUL BUSINESS DOES NOT INTERFERE WITH THE POLICE POWER OF THE TERRITORY BECAUSE THAT POWER MUST BE EXERCISED SUBSERVIENT TO THE CONSTITUTION.

The lack of authority of the Territorial Legislature to prohibit plaintiff's business does not interfere with whatever police power the Territory may hold, because even police power must, in its exercise, be subservient to the Constitution and it is limited by that instrument.

Mr. Justice Peckham, speaking for this Court, in Allgeyer v. Louisiana, said:

"To deprive the citizen of such a right as

herein described"—the right to contract outside the state for insurance on his property—"without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendant had a right to perform. This does not interfere in any way with the acknowledeged right of the State to enact such legislation in the legitimate exercise of its police or other power as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

Allgeyer v. Louisiana, 165 U. S. 578, 591.

And the like principle was stated by Mr. Justice Day, in speaking for this Court, in McLean v. Arkansas:

"It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. * * * * If there existed a condition of affairs concerning which the Legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

McLean v. Arkansas, 211 U. S. 539, 547,

548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206.

Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1915 C, 960.

But none such evils exist in plaintiff's business as might have been conjectured in many of the cases where a business has been prohibited by an exercise of the police power, for instance: Billiard room, Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L. R. A. (N. S.) 153, 32 Sup. Ct. Rep. 697; trading stamp business with seductive advertising, Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, Pitney v. State, 240 U. S. 387, 60 L. ed. 703, Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 679; selling 8 ounces lard as though 3 full pounds, Armour & Co. v. North Dakota, 240 U. S. 510, 515, 60 L. ed. 771; manufacture or sale of intoxicating liquor, Mugler v. Kansas, 123 U. S. 623; fires after certain hours in laundries in city largely composed of frame structure, Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 924; use of Flag for advertising purposes, Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696; and involves no injury to health, or adulteration of dairy products, or fraud in their sale, Powell v. Pennsylvania, 127 U. S. 684, and produces no discomfort or sickness nor operates as a nuisance, Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667.

On the contrary, it is admitted that "plaintiff's business is a useful, legitimate and commend-

able business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States" (Record, pp. 1 and 12, Certificate of Correction, p. 1.)

Even if it were not so admitted, if it be termed a "fishery" business, which is apparently the general classification accorded it by Congress, inasmuch as Congress by the Act of June 26, 1906, 34 Stat., 478, specifically brought the business within that Act which is an Act for the protection of the fisheries of Alaska, it undoubtedly is a lawful business, open to all, unless some specific statutory ban has been laid upon it, because at common law the right of fishing in navigable waters was common to all.

> "In State v. Roberts, 59 N. H. 256, which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the Court: 'At common law the right of fishing in navigable waters was common to all.'"
>
> *Lawton v. Steele*, 152 U. S. 133, 138.

See also:

> *Shively v. Bowlby*, 152 U. S. 1, 11; 38 L. ed. 331;
>
> *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248;
>
> *Martin v. Waddell*, 16 Pet. 376, 10 L. ed. 997.

Should it be termed a fertilizer business. be-

cause plaintiff manufactures fish oil, fish meal and fertilizer, still it has at least the rights accorded slaughter houses, and such institutions have been accorded many rights, even in centers of congested population, whereas plaintiff's business is located in an isolated village inhabited by the few whites and Indians who are its employees and situated far from the crowded marts of trade.

Butchers' Union &c., Co. v. Crescent City &c. Co., 111 U. S. 746, 757, 28 L. ed. 585, 590, 591.

But, as we have seen, Congress not only threw its protecting arm about the business by restricting, in the Organic Act (38 Stat. 616), the Territory from amending, modifying, altering or repealing the Act of June 26, 1906 (34 Stat., 478), being one of the "fish laws of the United States applicable to Alaska," but also has itself recognized plaintiff's business as a lawful business for a period of more than twenty years, first, by licensing it by the act of June 6, 1900 (31 Stat., 321, 330), and later by passing no prohibitive or restrictive legislation against it.

And though there may lie, between the useful businesses which may be regulated and the vicious and harmful businesses which may be prohibited, many nonuseful occupations which may, or may not be harmful according to local conditions or the manner in which they are conducted, yet that fact does not afford reason for prohibiting plaintiff's

business because by the admitted facts it is placed in the category of a legitimate, useful and commendable business. As such it possibly, disregarding for the moment the limitations upon the Territory's legislative power, might be subject to regulation, because this Court has said:

> "The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location may prove injurious or offensive to the public."
>
> *Murphy v. California*, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L. R. A. (N. S.) 153, 32 Sup. Ct. Rep. 697.

This concession, however, does not constitute a reason adequate to justify the prohibition and destruction of an admittedly "legitimate, useful and commendable business" such as plaintiff's even though it might be conceived that abuses might spring up therein, for, as said by this Court in Adams v. Tanner:

> "Because abuses may, and probably do, grow up in connection with this"—employment agency—"business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in any upright way. Certainly, there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earn-

> estly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent public condemnation of any one of them by the public. Happily, for all, the fundamental guarantees of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked. * * * * We are of opinion that Initiative Measure No. 8, as constructed by the supreme court of Washington, is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the 14th amendment, to engage in a useful business."
>
> *Adams v. Tanner*, 244 U. S. 590, 594, 61 L. ed. 1336, 1343.

Such conclusion is not contrary to the decisions of this Court in the three cases of Rast v. Van Deman & Lewis Co., Tanner v. Little, and Pitney v. State, supra, because in those cases it could be reasonably conjectured that the business was harmful to the public good, and hence there was a proper exercise of police power not subject to judicial review.

The Supreme Court of Kansas apparently so understood those decisions as, in a comparatively recent case, it said:

> "On March 6, 1906, two statutes quite similar to those which had been so generally condemned were upheld by the Federal Supreme Court in a series of unanimous opinions, on the ground that they were enacted under a proper exercise of the police power,

and that the decision of the legislative body that the use of trading stamps is harmful to the public is not subject to judicial review."

Kansas v. Wilson, 101 Kan. 789, 168 Pac. 679, L. R. A. 1918B, 374, 377.

XIII.

A CHARGE IMPOSED FOR POLICE SUPERVISION MUST BEAR A RELATION TO THE EXPENSE OF THE SUPERVISION AFFORDED, OTHERWISE IT IS NOT CONSTITUTIONAL.

The pleadings admit that "the tax is greatly in excess of the reasonable and necessary cost of any license or regulation whatsoever that could reasonably be required to be exercised over" plaintiff's business and that the "cost of regulating and supervising, and of issuing licenses for" plaintiff's business "is and would be, and has been, no greater than that of any of the other businesses or industries for which licenses are provided in said acts, but that plaintiff's said industry is arbitrarily, capriciously and unjustly taxed many times more than, i.e., a percentage many times larger than that levied on any other business in the Territory and that said Territory has, and had, no authority or power under its police power, either implied or otherwise, to impose said tax" and that, as a matter of fact, "no regulation or police supervision whatsoever over said business or industry is required or needed, or furnished therefor or thereto

by said Territory." (Record, pp. 5, 19; Certificate of Correction, p. 2.)

While this Court in Atlantic &c. Tel. Co. v. Philadelphia, said, in substance, that a municipality is not bound to furnish police supervision for nothing, and might, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision, yet it further added, Mr. Justice Peckham speaking for the Court:

> "But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purpose of revenue. When it is authorized in support of police supervision, the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost, that would be the limit of the tax."
>
> *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 164:

See also:

Postal-Tel. Cable Co. v. Taylor, 192 U. S. 64, 72, 73;

Foot & Co. v. Stanley, 232 U. S. 505, 58 L. ed. 698, 702;

People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L. R. A. (N. S.) 1074;

State v. Moore, (N. C.) 22 L. R. A. 472.

Hence, the imposition cannot be sustained as a police supervision fee even though the legislature were conceded to have authority to supervise plaintiff's business as a matter of police power, because it is, as we have just seen, admitted that the charge is many times larger than the expense of any possible supervision and that in fact no supervision is furnished.

XIV.

THE TERRITORIAL LEGISLATION AND TAXES IMPOSED THEREBY BEING VIOLATIVE OF THE FEDERAL CONSTITUTION, IT FOLLOWS THAT THEY ARE VIOLATIVE OF THE ALASKA ORGANIC ACT.

The Territorial legislation and the taxes imposed thereby are necessarily violative of the Organic Act in the same respects that they are violative of the Federal Constitution, because Congress expressly enacted that "the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States" (Sec. 3, Organic Act [38 Stat., 616]), and that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution

and laws of the United States, x x x and all laws passed, or attempted to be passed, by such Legislature in said Territory inconsistent with the provisions of this section shall be null and void." (Sec. 9, id.)

XV.

THE TERRITORIAL LEGISLATION AND TAXES IMPOSED THEREBY ARE ALSO CONTRARY TO THE ALASKA ORGANIC ACT BECAUSE THEIR EFFECT IS TO AMEND, ALTER, MODIFY AND REPEAL THE CONGRESSIONAL ACTS OF JUNE 6, 1900 (31 Stat., 321), and JUNE 26, 1906 (34 Stat., 478).

The Territorial legislation and the taxes imposed thereby also are contrary to the Alaska Organic Act (38 Stat., 616) on other than simply Federal Constitutional grounds, and the jurisdiction of this Court, having been invoked upon substantial grounds of Federal law, extends to the determination of those questions.

This principle is supported by a recent decision of this Court, viz:

> "Of course, the Federal jurisdiction, having been invoked upon substantial grounds of Federal law, extends to the determination of all questions involved in the case, whether resting upon state or Federal law."
>
> *Louisville N. R. Co. v. Greene*, 244 U. S. 522, 527, 61 L. ed. 1291, 1298;

Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 29 Sup. Ct. Rep. 451;

Ohio Tax Cases, 232 U. S. 576, 586, 58 L. ed. 737, 743.

These other questions involved the proposition that the legislation is plainly contrary to and inconsistent with the express limitations of the Organic Act (38 Stat., 616), and, hence, null and void.

The first of these questions we have already discussed (supra pages 83, et sequitur,), namely, that the legislation in effect amends, alters, modifies and repeals the fishing laws of the United States applicable to Alaska (34 Stat., 478) and the laws of the United States providing for taxes on business and trade in Alaska (31 Stat., 321). We will not therefore further discuss it, other than to add, perhaps at the expense of reiteration, that it is admitted that the Territorial legislation is so prohibitive that plaintiff will be compelled to cease from carrying on its business if the taxes thereby imposed against it be collected (Record, pp. 6, 15 and 17; Certificate of Correction, p. 1); that plaintiff's business was recognized as legitimate by both the Acts of Congress of June 6, 1900 (31 Stat., 321), and of June 26, 1906 (34 Stat., 478); that both of said Acts exacted a license tax from plaintiff and that plaintiff does and will continue to pay a license tax under the latter act, as

it superceded the former act in that respect, so long as it continues in business; that the Act of June 26, 1906, is the act expressly enacted by Congress for the protection of the fisheries of Alaska, and that Congress thereby threw a protective arm about plaintiff's business when it reserved from the Territorial Legislature any authority to amend, modify, alter or repeal that Act; that when plaintiff is so compulsorily forced to cease its business by the Territorial legislation, then it will no longer pay any Federal license taxes under the Act of June 26, 1906; thence, the effect is the same as though the Territorial Legislature had expressly repealed the Congressional Act of June 26, 1906, as well as the former Act of June 6, 1900, because in either event a nonpayment of the Federal tax will result, depriving the Federal government of that revenue, and effacing the recognition given plaintiff's business by Congress.

XVI.

THE TERRITORIAL LEGISLATION AND TAXES IMPOSED THEREBY ARE ALSO CONTRARY TO THE ALASKA ORGANIC ACT, BECAUSE THEY ARE NOT UNIFORM UPON THE SAME CLASS OF SUBJECTS AND ARE NOT LEVIED AND COLLECTED UNDER GENERAL LAWS; THE ASSESSMENTS ARE NOT ACCORDING TO ACTUAL VALUE, IN FACT NO AS-

SESSMENTS WERE MADE; AND THE TAXES, ALTHOUGH LEVIED FOR TERRITORIAL PURPOSES, ARE IN EXCESS OF ONE PER CENTUM PER ANNUM OF ANY POSSIBLE VALUATION WHICH COULD BE LAWFULLY ASSESSED UPON THE ACTUAL VALUE OF THE PROPERTY ON WHICH THEY ARE LEVIED.

The remaining questions to be discussed involve, what possibly might be termed, the method and basis under and upon which the levy is made, and disclose a plain violation of the express provisions of Section 9 of the Organic Act, both in spirit and in letter, wherein that Section reads:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; x x x x and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void."

(a) The tax in question is a property tax.

It has been said that it is sometimes difficult to distinguish between a tax and a license, but there can be no refutation that this imposition is a tax because its object, as a whole is to raise revenue and it is a charge or burden imposed for the support of the government. It will be noted that the

legislation in question not only is ostensibly for raising general revenue for Territorial purposes, but also that no privileges are granted to the plaintiff, and that, while it is made a misdemeanor punishable by fine and imprisonment, if the fine is not paid, a civil action is also provided for the recovery of the taxes. It is thus easily distinguishable from a license which is simply a permission to do what would otherwise be unlawful and has as its primary object the granting of some privilege or the imposing of some restraint .(Reser v. Umatilla Co., 86 Pac. [Ore.] 595, 597.)

The question, however, as to the nature of the imposition is undoubtedly settled by the controlling decision in Binns v. United States, 194 U. S. 491, because of the similarity in the method of procedure between the Territorial legislation in question and the Congressional enactment under consideration by this Court in that case, and there can be little contradiction that the imposition is primarily a tax, and not a license.

Such concession is not inapposite to the conclusion, however, that the tax as a matter of fact is a property tax. "There have been many fluctuations of opinion upon the question as to whether a privilege tax is a tax upon property" (Gulf and Ship Island Rd. Co. v. Hewes, 183, U. S. 66, 77), but the decisions of this Court have apparently settled beyond all controversy that a license tax on the occupation of doing a business is a tax on the

business carried on, and that a tax on the business carried on is a tax on the property; hence, that "a tax on the seller of goods is a tax upon the goods themselves." Kehrer v. Stewart, 197 U. S. 60, 65.

This Court has also said:

> "Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business. x x x It is a parallel with the case of Brown v. Maryland, 12 Wheat, 419. That was a tax on an occupation, and this Court held that it was equivalent to a tax on the business caried on,—(The importation of goods from foreign countries),—and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibited the states from laying any import. x x x 'And the Court decided that this state law (the Maryland land law under consideration in Brown v. Maryland) was a tax on imports, and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance.'"
>
> *Leloup v. Port of Mobile*, 127 U. S. 640, 645, 646, 647.

See also:

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347;

Brown v. Maryland, 12 Wheat 419, 6 L. ed. 678.

It follows that a tax on the business of carry-

ing on a fish oil or fish meal works, or of manufacturing fish oil and fish meal, is a tax on the goods or product manufactured, namely: fish oil and fish meal.

A very similar tax was before the Supreme Court of Mississippi, in which a tax of a certain amount per cup or box was laid for the privilege of carrying on the business of extracting turpentine from standing trees, and that Court held that the tax was a property tax, and, hence, being inconsistent with the uniformity clause, was null and void (Thompson v. McLeod, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, 897), and this Court, in Gulf & Ship Island Rd. Co. v. Hewes, supra, held that it was well settled that the law of this Court is that a tax on railroad franchises is a tax on property.

(b) License taxes are subject to Constitutional limitations when there is no express exemption therefrom, and peculiarly so when considered as property taxes.

It would therefore appear that the imposition is a property tax and must come within the limitation of the Organic Act (38 Stat., 616) that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws," and that such would be the case even were it denominated a license tax because the substance, not the form, is the vital factor, and the

substance is subject to the limitations of the Organic Act; the same as the tax under discussion in Welton v. Missouri, supra, was held null and void because the state had legislated upon a subject which was reserved to Congress, that is, enacted a tax which was inconsisent with the limitations of its authority as imposed or reserved by the Federal Constitution.

It seems as though this also would be true even were it not in fact a property tax for Congress has used the strongest possible language when it said "all taxes shall be uniform upon the same class of subjects." It can scarcely be conceived what further words could have been added to bring within its scope such a tax as the one in question if the words "all taxes" fail to do so. "All" is a word of boundless expression; of such unlimited breadth that nothing more can be joined to it. Whereas, if Congress had intended that this proviso should not apply to license taxes, it could easily have inserted the words, which otherwise though absent it is necessary to read into the act to reach that construction, namely: "All taxes, except license taxes, &c." Thus, the imposition by which plaintiff is required to pay annually $2.00 per barrel on its fish oil and $2.00 per ton on its fish meal, made of herring in whole or in part, being undoubtedly a tax, is, regardless of its kind or nature, by the language of Congress included within the uniformity clause, unless some exemp-

tion, qualification or modification of the words "all taxes" is to be found in the Organic Act (38 Stat., 616.)

No such exemption is to be found, nor is such modification or qualification contained in the proviso in Section 3 of that Act that: "This provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses," because this proviso is simply a limitation upon a limitation, that is to say, Congress made certain provisos limiting the power and authority of the Territorial Legislature, and then, fearing that its meaning might be misunderstood and its language construed to mean that the Territory had no power to levy any taxes or licenses, added, for the purpose of clarifying and rendering certain its express limitation upon the Territory's authority, a further clause to the effect that it did not mean by those express limitations that the Legislature should not have authority to raise revenue by taxes or licenses or that it, Congress, had taken away that implied power from the Territory.

The learned trial court apparently deemed this question settled, so far as it was concerned, by the decision of the Circuit Court of Appeals for the Ninth Circuit in Alaska v. Alaska Pacific Fisheries, 236 Fed. 52, and particularly by the language in that case, that:

> "Many well-considered cases might be cited holding that taxes which are levied on

occupations, business, or, it may be, franchises, are not brought within the principle of equality and uniformity in the sense that the Legislature must make the taxation of all occupations or pursuits equal."

There are to be sure many such cases, but we believe they are readily distinguishable from this case in one of three ways: either, because the decision fails to hold that a license tax is a property tax when the tax actually falls on property as in this case; or else, because there is an express authority to levy occupational taxes as distinguished from and as additional to property taxes; or lastly, because license taxes are authorized free from constitutional limitations, and that they do not contradict the decisions holding that license taxes are subject to constitutional limitations. For instance, in Bank v. Apthorp, 12 Mass. 252, 254, the Court held that an exaction of 1% per annum upon the capital of all banks was not uniform under a constitutional provision "to impose and levy proportionate and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident and estates lying within, the commonwealth," but sustained the tax under a further express proviso authorizing the imposition and levying of reasonable duties and excises upon any products, goods, &c.

In re Watson, 17 S. D. 486, 97 N. W. 463, 465, it was held that the constitutional clause "and

all taxation shall be equal and uniform," applied not only to ad valorem taxation, but also to occupational taxes.

And in Railroad Co. v. State, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380, 383, the court held that a tax or fee of $1.00 per mile for each mile of railroad track was in violation of the constitutional provision that "Laws shall be passed taxing by uniform rule, all moneys, credits, investments, * * * and also all real and personal property, according to its value in money * * *."

And in Levi v. Louisville, 28 L. R. A. (Ky.) 480, 484, the Court went so far as to state that the constitutional requirement that taxes shall be uniform upon all property subject to taxation and shall be assessed at its fair cash value is violated by a municipal tax which applies the ad valorem system to real property and a license tax to personal property, although the Constitution provided for taxes based on licenses or franchises.

The Oregon Supreme Court, under a constitutional provision "that the rate of assessment and taxation shall be equal and uniform" said:

> "A distinction between a tax on a business or property and a license may be said to be that the former is exacted by reason of the fact that the business is carried on or the property is within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business or have such property within the jur-

jsdiction. Within these definitions a mere tax on sheep of non-resident owners can not be said to be a license unless the payment of such tax conferred some right or privilege upon such owner which did not otherwise exist. We do not understand that such is the case here. The law is entitled 'An Act to tax foreign sheep coming into the State of Oregon,' etc., and simply provides the amount of said tax and the manner of its collection. No such privileges are granted to the non-resident owner by reason of the payment of the tax, nor is the payment of such tax made a condition precedent to the right to bring sheep into the state, if, indeed, such legislation would be valid. Nor does the failure to pay the required tax render the pasturing of sheep in the state illegal, any more than the failure of a man to pay the taxes upon a farm renders the occupation of farming illegal. The law does not pretend to impose any restraint upon the sheep industry and no privilege is granted by its terms. The burden is imposed upon the property, not upon the business, and applies alike to the man who brings his sheep into the state to pasture them upon land of his own or that of the government and the man who brings his sheep into the state to pasture them upon the land of the state. We are, therefore, forced to the conclusion that it is essentially a revenue law, and void, within the rule announced in Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454, 458, because the tax is not uniform and equal, nor levied with reference to the value of the property and such is the conclusion reached by courts upon substantially the same character of legislation."

Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595, 597.

The same Court also held in Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454, 458, that a uniform tax of $1.25 per annum upon bicycles, regardless of their value, for the construction of bicycle paths, violated the constitutional provision, that "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulation as shall secure a just valuation for taxation of all property, both real and personal • • • ."

We also refer to:

Henderson v. Insurance Co., 135 Ind 23, 38 N. E. 565, 568;

State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970;

Minces v. Shoenig, 75 N. W. (Minn.) 711, 712;

State v. Whitcom, 122 Wis. 110, 99 N. W. 468; • • •

State v. Pennoyer, 18 Atl. (N. H.) 878;
St. Louis v. Spiegel, 2 S. W. (Mo.) 839;

Willis v. Standard Oil Co., 52 N. W. (Minn.) 652;

State v. Moore, 22 L. R. A. (N. Car.) 472;

Keowa Co. v. Dunn, 21 Colo. 185, 40 Pac. 357;

Smith v County Com., 117 Ala 196, 23 So. 141;

Livingstone v. City Council, 41 Ga. 21;
Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408;

Simms v. Parish of La., 22 La. Ann. 444.

From these decisions, we submit the conclusion is well justified that license taxes are subject to constitutional provisions as to uniformity.

(c) License taxes are also subject to Constitutional limitations as to method and amount of assessment.

But it may be said that the Organic Act (38 Stat., 616) provides that "all taxes shall be uniform upon the same class of subjects" and that all occupations, or even one class of occupations, constitute one or the same class of subjects and, therefore, a like tax upon either all occupations, or all occupations of the same class, is uniform. Such contention cannot be upheld for, not only is it admitted "that the taxes levied under each of said acts are not uniform and are not levied and collected under general laws" (Record, pp. 3 and 14), but it is also admitted that the same tax is not imposed upon all occupations of the same class, that is to say:

> "That although there are other persons and corporation in the said Territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring, either in whole or in part,

no license or other tax whatsoever is assessed against or levied upon them by the Territory of Alaska; and that the said business of said other persons and corporations is in all essentials the same as the business of this plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations." (Record, pp. 6 and 17; Certificate of Correction, p. 1.).

Congress, however, did not stop with the words "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws," but continued its limitation further by saying "and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year." (Sec. 9, Organic Act, [38 Stat., 616]).

The Territorial legislation, as has hitherto been noted, is the system in vogue for raising the general revenue for Territorial purposes, there being no other legislation for that purpose; hence, it is of course to be distinguished, if needs be, from such taxation as might be for other than "Territorial purposes" and from that class of special tax or assessment laid for the purpose of some particular improvement or betterment, such as a school or road tax, although we do not concede that such special tax would be exempt from the constitutional

limitations under discussion, at least, not if such special tax or assessment were levied for "Territorial purposes"; in other words, we contend, that all taxes are subject to, and no tax is exempt from, the limitations of the Alaska Organic Act.

Possibly it is important to bear this in mind for, if the admitted premise is true, namely, that the legislature entirely disregarded the actual value of the property although the tax is upon property, or as the allegation reads:

> "Attempts to and does levy an annual tax, upon plaintiff's property in the Territory of Alaska, for Territorial purposes in excess of one per centum of any valuation that might or could be lawfully fixed, upon plaintiff's said property, as a basis for such assessments thereof, although no provision is made in either or any of said acts for the assessment of the valuation of the plaintiff's property in the Territory of Alaska so levied upon; * * * nor are said taxes based upon an assessment according to the actual value of the plaintiff's property upon which the taxes are fixed or levied." (Record, pp. 2, 3, 13 and 14.)

—and the Territorial legislation itself forcibly supports this premise, by clearly showing the discrepancies between the various bases of taxation employed, including a flat rate, percentage rate, and unit rate, all without regard to value—then there would be no difference in principle for the Legislature, in order to raise general revenues for Territorial purposes, to lay a tax in a fixed sum

upon all persons manufacturing fish oil and fish meal, for each building or each acre of land owned, or for each machine or boat operated, or for each fish caught or processed, or for each barrel of fish oil or ton of fish meal produced, whether valueless or valuable; and this would be equivalent to laying a tax on all attorneys-at-law in a fixed sum for each law book employed in his profession, regardless of whether the books were old or new, good or bad, cheap or costly; or on the business of being a fisherman and levy a fixed sum on each fish caught; or on the business of being a logger, and lay a tax on each tree felled, or so much per foot of all logs cut or sold; or on the business of being a miner or prospector, and levy the tax on each ounce of gold, silver, or other mineral or metal found or discovered; or on the business of being a farmer and lay a tax on each bushel of wheat, barley, oats or corn raised or sold, or on the basis of each acre of land held, owned or leased, and so on ad infinitum; regardless of whether the tax exceeds 1% of the assessed valuation based on the actual value or not. But in all of these instances, the tax would fall upon property and would not be uniform, nor based upon actual value, nor within the fixed limitations of 1% of the actual value. Or, in the language of the Supreme Court of Ohio, in the case already referred to:

> "In both instances the tax is levied upon property, but it is neither levied 'according to

its true value in moneys' nor uniformly upon all property."

Railroad Co. v. State, 49 Oh. St. 189, 30 N. E. 435, 16 L. R. A. 380, 383.

While in Minces v. Schoenig, 75 N. W. (Minn.) 711, 712, the tax was sustained on the ground of police power, it was held that an ordinance providing for a 2% tax on gross receipts of conductors of gifts, fire and bankrupt sales was in violation of the Constitutional provision that "all property on which taxes are to be levied shall have a cash valuation."

And as said by the Oregon Supreme Court, in Reser v. Umatilla County, 86 Pac. (Ore.) 595, 597, we are forced to the conclusion that ostensibly the Territorial legislation is essentially a revenue law for Territorial purposes, and void, "because the tax is not uniform, * * * nor levied with reference to the value of the property."

It may be inquired, how is an occupation to be assessed, but, as said by the Supreme Court of Pennsylvania, in the case of Banger's Appeal, 109 Pa. St. 79, 94, which held that there was no uniformity in laying a tax of $100.000 upon A and a like levy of $200.00 upon B, the occupation of each being the same, "the answer is not difficult." It would be equally as easy for the Territorial Legislature to base these taxes upon assessments on an actual valuation as to use the present method; in

fact, practically all that would be necessary would be a change in the Territory's printed forms. Under the present system the Territory relies entirely upon the honesty of the licensee, who pays the tax at the end of the year, to make a true report (Sec. 2, Chap. 74, Alaska Session Laws 1917); whereas, the Territory would have no more difficulty in collecting the tax if it required the annual report of the licensee at the close of the year to state the actual value of the product, and made an assessment upon such actual value. There could be no more opportunity of fraud on the part of the licensee if required to state the actual value, either cost, buying or selling price, or other basis used, and to pay a tax levied under an assessment thereon, than in requiring the licensee to annually report the total number of units of product manufactured and to pay a fixed sum per unit thereon.

The fact that Congress by the Acts of June 6, 1900 (31 Stat., 321), and June 26, 1906 (34 Stat., 478), may have lawfully disregarded uniformity upon all occupations and not fixed the taxes therein provided under an assessment based on the actual value is, moreover, inapposite to a contention that the Territorial Legislature may do likewise, because the former has plenary power and is not restricted by the Federal Constitution in levying those taxes (Binns v. United States, 194 U. S. 491), whereas the latter is acting only under

such powers as have been conferred upon it by Congress and, hence, the exercise of those powers must be subservient to the limitations imposed in the Organic Act (38 Stat., 616) by Congress.

There is nothing unusual in Congress' thus fixing a limitation on the Territorial Legislature's power of taxation; in fact, as early as June 6, 1900 (31 Stat., 521), twelve years prior to the creation of the Territorial Legislature, Congress specifically relegated the municipal councils of Alaska, which were then the only form of local government, to a poll tax of not less than $2.00 nor more than $4.00, to a dog tax of not more than $2.00, and to a general tax for school and municipal purposes of not more than two per centum per annum on the assessed valuation; and on April 28, 1904 (33 Stat., 531), kept these limitations in force; and by the Organic Act (38 Stat., 616), Section 9 thereof, limited any incorporated town or municipality to a two per centum per annum tax for any purpose upon the asssessed valuation; reserved the right in Congress for a period of five years to impose any tax or taxes upon railways or railway property; and specifically restricted the Territorial Legislature against taxation of Federal property and against taxation of lands or other property of nonresidents higher than residents; in fact, practically the whole of said Section 9 is devoted to either expressly limiting the Territorial Legislature's

authority or to expressly reserving certain powers to Congress.

These limitatory provisions were perhaps wise considering that the Legislature has pursued a system by which it may unjustly impose a like annual occupational tax upon the poor laborer and the rich merchant, upon the poor acreage and the rich, upon the ton of low-grade gold ore and the ton of high-grade gold ore, and, even though it need not make such patent and glaring discrepancies as that to which the instance case bears testimony, yet, if it has this power to thus oppress and prohibit the plaintiff's business, it follows that it also may oppress the fisherman himself, by laying a tax on the business of being a fisherman, based upon each fish caught, so prohibitive that the Alaskan fishermen may not compete with the Canadian, Washington, Oregon or California fishermen, but needs must entirely quit his fishing business; or levy such tax alone on each king salmon caught by the "troller" or each halibut caught by the halibut fisherman, so that they are compelled to cease their customary calling; and likewise upon the logger, the prospector, the farmer, or any other industry or calling, the pursuits of all of which are necessary to the development of the Territory. Whereas, if the legislation be confined to the Congressional limitations none of these evils may result, for the poor and the rich, whether men, lands or goods, if taxed, would pay according to the

actual value of the property on which the tax fell, or, at most, subject only to a discrimination confined within a maximum range of 1% of that actual value.

We cannot conceive how a system of taxation, such as necessarily may and in the instance case actually has resulted, if this imposition be valid, could be more violative of a constitution than one which totally ignores the constitutional limitation calling, first, for uniformity, second, for confinement within a maximum levy of one per centum, third, for an actual assessment to be made on which the levy is to be based, and, fourth, for such actual assessment to be made upon the basis of the actual value of the property on which the tax falls.

The language of the Supreme Court of Minnesota, in a case before it, involving a tax of 50 cents for each ton of copper and 1 cent for each ton of iron ore mined, shipped or disposed of, which tax was imposed in the face of a constitutional provision that "all taxes to be raised in this state shall be as nearly equal as may be," and all property on which taxes are to be levied shall "have a cash valuation and be equalized and uniform throughout the state," is very apt, viz.:

> "It would be difficult to conceive of a system of taxation more obnoxious to the constitution."

State v. Lakeside Land Co., 71 Minn. 283. 73 N. W. 970.

XVI.

CONCLUSION.

Inasmuch as the taxes are illegal and the Territory of Alaska as well as the defendant were advised that plaintiff so regarded them at the time of payment thereof and that suit would be instituted to compel the refunding thereof (Record, pp. 8, 9, 19, 20), plaintiff is entitled under the admitted facts and the authorities to have judgment against the defendant for the amounts sued for (Erskine v. VanOrsdale, 82 U. S. 75, 15 Wall. 63), together with interest on said judgment (Cochran v. Sebell, 107 U. S. 625, 27 L. ed. 544), at the legal rate of eight per centum per annum (Sec. 684, Compiled Laws of Alaska, 1913 [31 Stat., 533]; Chaper 17, Alaska Session Laws, 1913: "The rate of interest in the district shall be 8% per annum, * * * .").

And while any contention as to defects in parties or as to want of duress was waived (Record, pp. 25 and 31), Alaska being an organized territory against whom no suit could lie except by its consent or under a statute (Porto Rico v. Rosaly & Castillo, 227 U. S. 270, 57 L. ed. 507; Richardson v. Fajardo Sugar Co., 241 U. S. 44, 60 L. ed. 879; Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 L. ed. 477), not only was it proper to sue the collecting officer individually, but the Territory can be depended upon to protect him. (A. T.

& S. R. Ry. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436; Gaur, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510; Poindexter v. Greenhow, 114 U. S. 270; Osborn v. The Bank of the United States, 9 Wheat. 783).

All of which is respectfully submitted.

Dated at Juneau, Alaska, December 2, 1920.

Robt. Robertson

Counsel for Plaintiff in Error.